

Nos. 14469-14470

**United States
Court of Appeals**
for the Ninth Circuit

JOHN K. BORG,

Appellant,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW PUBLISHING
COMPANY, INC., a Corporation,

Appellee,

and

JOHN K. BORG,

Appellant,

vs.

THE TRIBUNE PUBLISHING COMPANY, a Corporation,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 25 to 293)

**Appeal from the United States District Court
for the District of Idaho,
Central Division.**

FILED

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Appeal from the United States District Court
for the District of Idaho,
Central Division.

In the United States District Court for the District
of Idaho, Central Division

No. 1950

JOHN K. BORG,

Plaintiff,

vs.

T. C. THOMAS, LOUIS A. BOAS, THE NEWS-
REVIEW PUBLISHING COMPANY, INC.,

Defendants.

No. 1951

JOHN K. BORG,

Plaintiff,

vs.

T. C. THOMAS and THE TRIBUNE PUBLISH-
ING COMPANY, a Corporation,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Appearances

J. P. TONKOFF, ESQ.,
Yakima, Washington;

MURRAY ESTES, ESQ.,
Moscow, Idaho;

TOM FELTON, ESQ.,
Moscow, Idaho,

Attorneys for the Plaintiff.

MAURICE GREENE, ESQ.,

Boise, Idaho;

V. R. CLEMENTS, ESQ.,

Lewiston, Idaho;

REED CLEMENTS, ESQ.,

Lewiston, Idaho,

Attorneys for the Defendants.

April 5, 1954, 10 A.M.

(Selection of jury.)

Mr. Clements: I have a motion, perhaps it should be made in the absence of the jury.

The Court: I was about to take a recess at this time for 15 minutes and I will excuse the jury and ask them to meet me in 15 minutes.

Mr. Clements: Comes now the defendant, T. C. Thomas, and respectfully shows to the Court that he is a party defendant in each of the above actions now pending in this court, both of which are at issue and set for trial upon their merits.

That the answer of the defendant filed in each of the above cases pleads as an affirmative defense that the words of the alleged libelous material set forth in each of said actions involve the same utterance to the same audience of the matter alleged in the respective actions and both actions are founded upon a single utterance or publication contrary to the provisions of Chapter 109, of the Idaho Session Laws of 1953, known to be and cited as "Uniform

Single Publication Act'' which bars plaintiff's right of recovery in one or the other of said actions. [1*]

Therefore, by reason of the premises mentioned the defendant respectfully moves that an order be made and entered herein requiring the plaintiff to elect the action upon which he will prosecute and to dismiss the defendant from the one not elected.

This motion is made and based upon the records and all of the records and files of the above-entitled action, all of which are hereby referred to and by reference made a part hereof.

Mr. Tonkoff: We feel that we should concede the motion and we elect to dismiss the defendant T. C. Thomas from action 1951 which is designated as the Tribune action and hold him in action No. 1950 in which the defendants are Thomas and the News-Review and Louis A. Boas.

The Court: Very well, the motion is granted and you elect to hold him in the so-called **Moscow case**.

Mr. Clements: I understand that when we convene Court again this afternoon that you will advise the jury that these two cases have been consolidated for the purpose of trial and that the defendant Thomas is only in the one case.

The Court: That is right. I will have [2] the bailiff advise the jury to meet us here at 2:00 o'clock this afternoon.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

April 5, 1954, 2:00 P.M.

The Court: Ladies and gentlemen of the jury, by way of explanation I will tell you at this time that there are two cases that have been filed here, one is entitled John K. Borg vs. T. C. Thomas and the Tribune Publishing Company, a corporation, the other one is John K. Borg vs. T. C. Thomas, Louis A. Boas and The News-Review, Incorporated. The Court felt that it would not be justified in having the expense of two trials as the matters involved are essentially the same, in fact, they are the same in both the publication. However, you cannot bring two suits against one person because of one publication which was published in both papers. Mr. Thomas, that is Mr. T. C. Thomas who is named as defendant is dismissed from the case of John K. Borg vs. T. C. Thomas and The Tribune Publishing Company. He is, however, still a party defendant in the other case. I don't think you will have any difficulty in this because in the final submission of the matter to you I will make it plainer, I will go into this in more detail. There are two cases filed and, as I said, I didn't feel justified in having two trials and going to that additional expense in connection with this matter, so the cases have been consolidated for the purpose of this trial. Counsel for the plaintiff may make their opening statement.

(Opening statement by Mr. Tonkoff.)

The Court: You may call your first witness.

Mr. Tonkoff: I think I will call Louis A. Boas as an adverse witness.

LOUIS A. BOAS

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is Louis A. Boas? A. Yes.

Q. And where do you reside, Mr. Boas?

A. Moscow.

Q. And what is your occupation?

A. Editor of the Daily Idahonian.

Q. How long have you acted as such?

A. In that capacity since 1939.

Q. I assume as editor you know what your paper prints and must [4] ratify the articles that come out in the paper? A. Generally, yes.

Q. Mr. Boas, the Idahonian on May the 13th—a certain article came out in the paper on that date and referring to an article starting in the third column on Page 2, I desire to ask you if you knew when that article was published?

The Court: I think perhaps you better have it marked as an exhibit first.

Q. I believe it is in the third column on the second page of that exhibit marked for identification as Exhibit No. 1—that is a true and correct copy, of course, of that edition that came out?

A. That is correct.

Q. Dated May 13, 1953? A. Yes.

Q. And a part of that article is referred to in

(Testimony of Louis A. Boas.)

the complaint and I assume that you are acquainted with the complaint against the News-Review?

A. I read it sometime ago, yes.

Mr. Tonkoff: I now offer that exhibit in evidence.

Mr. Clements: I have no objection.

Mr. Greene: No objection.

The Court: It may be admitted.

Q. About what circulation does your paper have, Mr. Boas? [5] A. About 4200.

Q. And where is that circulation, in what counties is it circulated, does it go into Washington?

A. Latah County and some in Eastern Washington, that is, in Whitman County, in Pullman and Palouse.

Q. Now, 4200 circulation, that means that you would have about 14,000 readers, is that right?

A. I would say around 12,000, figuring three to a family.

Q. Where is the paper printed?

A. At Moscow.

Q. And about what is the size of your plant?

A. The size of the plant?

Q. Yes.

A. Well, I don't know the measurements.

Q. How many do you employ?

A. About 30.

Q. Is that a daily? A. Yes, it is a daily.

Q. This is a corporation, is it not, the News-Review? A. That's right.

Q. Who are the stockholders?

(Testimony of Louis A. Boas.)

Mr. Greene: I think I am going to object to that, if the Court please, the legal status of the corporation is admitted and I think it is immaterial who the stockholders are. [6]

Mr. Tonkoff: I guess maybe you are right on that.

The Court: Yes, I think that is right.

Q. What is the capitalization?

Mr. Greene: Now, I object to that also as immaterial.

The Court: He may answer.

Q. What is the capitalization, Mr. Boas?

A. I believe it is \$25,000.00.

Q. Are you familiar with the valuation of that plant—as a matter of fact it is worth about a quarter of a million dollars, isn't it?

A. I would not think so.

Q. What would you think it was worth?

A. Well, I would say possibly \$200,000.00—that would not be the plant, that would be the business, it might be worth that—I don't think that the plant would be over \$125,000.00 to \$150,000.00 that would be the entire business.

Q. And that would be the over-all value, you believe, at \$200,000.00?

A. That would be purely my guess, I never had it appraised or evaluated.

Q. Of course, Mr. Boas, you were familiar with this article, were you not? A. Yes. [7]

Q. And you sanctioned, approved and authorized the printing of it? A. Yes.

(Testimony of Louis A. Boas.)

Q. I assume that you were quite familiar and are quite familiar with the situation existing, as the Estes-Shoup situation, if I may refer to it in that manner?

A. Yes, as a newspaper editor I was familiar with it.

Q. On several different occasions prior to May 13, your paper had published articles concerning the dismissal by Judge Borg of the case of State vs. Estes?

A. We printed it once for each dismissal, I believe.

Q. You say once? A. Yes.

Q. Now, when did the dismissal take place?

A. The first one, you mean?

Q. Yes.

A. I think shortly after 9 o'clock in the morning and that was on January——

Q. ——January 15, 1953?

A. Yes, we published that dismissal the same day in the afternoon.

Q. And you also published it the following day?

A. There may have been reference to further facts of the case, I don't recall what was published the following day, but if there was any new situation or question of having a rehearing or something of that kind. [8]

Q. You also published it on the 19th, didn't you?

A. Well, you will have to show me the paper, I don't remember what I publish each day.

Q. Yes, I will show you—on April 19th you

(Testimony of Louis A. Boas.)

again referred to the dismissal by Judge Borg—on the 19th of April your paper again referred to that, to the same situation?

A. I would have to look at the paper to know what story you are referring to.

Q. Well, Mr. Boas, you know that you referred to it on May 13th?

A. We referred to the public meeting at the high school on May the 13th.

Q. And you also referred to the dismissal by Judge Borg—

Mr. Greene: —I will object to this, if the Court please, the article, of course, is the best evidence and it is not proper to be asking this witness as to the contents.

The Court: Yes, I imagine that it is a pretty hard strain for him to go back and remember the dates that he edited all of the articles in the paper and what they were.

Q. On May the 13th, I am referring now to an article—

The Court: —We will wait just a minute, Mr. Tonkoff, that noise is the sheriff and the deputy marshal trying to arrange some seats for those [9] who are standing.

Q. Would you like to refer to the paper, Mr. Boas?

The Court: Mr. Bailiff, hand the witness the paper, Exhibit No. 1.

Q. The 6th line from the top "Miscarriage of

(Testimony of Louis A. Boas.)

Justice," where that reference is made in the paper, that refers to Judge Borg, does it not?

Mr. Greene: I am going to object, if the Court please, the article speaks for itself and it has been admitted in the answer and counsel now is attempting to have the witness place an interpretation on the article and I think perhaps that is for the jury.

The Court: Yes, I think it is for the jury to interpret the article.

Q. Referring to the second column and commencing with the third paragraph, the word "Thomas" then made reference to legal maneuvers in which a hearing was set for January 15, at 9 a.m., and at 8 a.m. that day, Thomas explained that Alsager notified Judge Borg that he would be ready at 9. And Alsager and his witnesses were present at Police Court, normally the place where such hearings were held, but the Judge and Estes, Thomas said, had gone to the County Courthouse to hear the case. Calling your attention to substantially that language, your paper did refer to this dismissal as late as May 13, did it not? [10]

A. Mr. Thomas referred to it and we were reporting his address before the people.

Q. You mean that you think there is no responsibility on you because you were quoting Mr. Thomas, is that what you mean?

Mr. Greene: Again I object on the ground that this is a matter for the jury, and it is argumentative.

The Court: Yes, that is a question for the jury, questions of law, of course, are for the Court.

(Testimony of Louis A. Boas.)

Q. Now, I will ask you if you did not on the 16th refer to the dismissal, in the article on the 16th of January?

Mr. Greene: I object to that on the ground that the article is the best evidence as to its contents.

The Court: The objection is sustained.

Mr. Tonkoff: All right, I have the article here and I will offer it in evidence. I do not have the paper, I merely have the article, and I assure counsel and Court that it is the date.

The Court: You may have it marked.

Mr. Tonkoff: If they do question it I will have the witness produce the paper. I have another here also on the 16th. Mr. Bailiff, I offer each of [11] those.

Mr. Greene: I object to them, there is no claim that these articles are libelous in any way and they are, therefore, immaterial and do not tend to prove any issue in the case.

The Court: I think it should be confined to the article that is in the complaint.

Mr. Tonkoff: Your Honor, it is, it is offered in evidence for another purpose which I think I could make clear if Your Honor wanted me to make a statement in the presence of the jury, but I hesitate to do so.

The Court: I am not afraid of this jury, you can make your statement in their presence.

Mr. Tonkoff: I am not afraid of them either, but I thought perhaps the Court might object to it. The purpose of this is to show malice that didn't refer

(Testimony of Louis A. Boas.)

to it only once but on several different occasions, 2, 4, 6, 8, 10, 12, 13 times, and that goes to the punitive damages. If we can show that there were articles published subsequent and prior to the time to the article that the action is based on, this article, then, Your Honor, it will show they were malicious and Judge Borg would be entitled not only to compensatory but also to exemplary or punitive damages, that is my position, Your Honor. [12]

Mr. Greene: In the first place, Your Honor, the plaintiff has not asked for punitive damages, and second, these publications are entirely outside of the scope of the complaint for the reason that Paragraph Four of the complaint alleges the libel to be an article or quotation therefrom of which Captain Thomas was the author and which were printed in the Daily Idahonian and this article here has not been established as being in any way connected with the article which Captain Thomas is supposed to have turned over to the newspaper for publication. As a matter of fact, Your Honor, the complaint shows on its face that the Captain Thomas article was not written until the 12th day of May, 1953. Now, these newspaper articles refer to matters that took place in January, 1953, or four months before the alleged libel was even written by the defendant Thomas.

The Court: The objection will be sustained. I can't see anything in these articles but news, there is nothing to show any malice. There is nothing here to show any malice on the part of this witness.

(Testimony of Louis A. Boas.)

Mr. Tonkoff: In accordance with the ruling in the case of Dwyer vs. Libert which is an Idaho case, even though we have not specifically alleged exemplary damages they can be shown, according to that case, at least that is my understanding. [13]

The Court: I am not ruling on that question, I am just saying that these articles are nothing but publication of news and there is nothing in the article or either article to show any malice on the part of this witness.

Q. Now, I will ask you if you did not again mention the dismissal on April the 13th, in the article that I am going to show you, and Your Honor, I refer to that portion of the article marked in red—I show that for your examination.

The Court: I think you should have it marked and shown to counsel.

Q. I am referring to that place with the red mark at the bottom.

Mr. Greene: I am going to object to this until the exhibit is offered and received in evidence. I object to it for that reason before the witness identifies anything as to its content.

Mr. Tonkoff: Is there any question but that this is dated the 13th, Mr. Greene?

Mr. Greene: If you are offering the article I am going to object to it.

Mr. Tonkoff: I am offering it but, as I say, I have not yet laid the foundation, I am making [14] a statement that it is dated April 13th, coming now

(Testimony of Louis A. Boas.)

to the Idahonian I don't know that the article identifies itself as coming out of that paper and if there is any question about that, Your Honor, there may not be a proper foundation laid.

The Court: Maybe the witness can tell us whether it is out of his paper or not.

Q. Is it out of that paper, Mr. Boas?

A. I would say it was out of that paper, yes.

Mr. Tonkoff: Now, I offer it in evidence for that purpose, where there is the red mark.

Mr. Greene: Now, I object to it again on the ground that it antedates the alleged libel in the complaint and also it is incompetent, irrelevant and immaterial to establish malice on the part of the defendant and the newspaper of which he is the editor.

The Court: The objection will be sustained.

Mr. Tonkoff: If the Court please, I base my contention on the ruling in the case——

The Court: ——The Court has ruled.

Mr. Tonkoff: All right.

Q. Mr. Boas, did your paper carry articles or solicitations for the Dick Shoup defense fund?

Mr. Greene: I object to that as being [15] entirely immaterial, Your Honor.

The Court: Was that after this incident?

Mr. Tonkoff: No, it was before and this is on the proposition that I submitted on articles published subsequent and prior to the time the action was taken.

The Court: What was the question?

(Testimony of Louis A. Boas.)

Mr. Tonkoff: The question was whether the Daily Idahonian carried articles or advertisements for the Dick Shoup defense fund?

Mr. Greene: Now, your question is duplicitous, do you mean articles or do you mean advertisements?

Mr. Tonkoff: Well, it is in the form of an advertisement, Mr. Greene.

Mr. Greene: I again object to it as being wholly immaterial, there is no allegation of libel in connection with any Dick Shoup defense fund and on the ground also that it antedates any allegation in the complaint.

The Court: The objection will be sustained.

Mr. Tonkoff: Now, Your Honor, I have an article here which I will mark and I call Court's [16] attention to this article dated April the 9th.

The Court: This may be shown to counsel.

Mr. Tonkoff: I have marked it, Mr. Greene, where I contend the article is material.

The Court: Now, you may hand it to the witness, Mr. Bailiff.

Q. Was that article carried in the Idahonian, Mr. Boas? A. It appears to be, yes.

Mr. Tonkoff: I refer to the markings on the article again, Your Honor.

Mr. Greene: Are you offering it at this time?

Mr. Tonkoff: Yes, I am.

Mr. Greene: I object to that as being incompetent and immaterial and not tending to prove any

(Testimony of Louis A. Boas.)

issue in this case, there is no libel in this article and it antedates any libel alleged in the complaint.

Mr. Tonkoff: I don't know whether Your Honor wants to hear from me on this or not.

The Court: No, I will sustain the objection. I am not going to try anything here only the article that is before the Court.

Q. Did you, on occasion, refer to the same dismissal as late as April or May? [17]

Mr. Greene: We object to that as being irrelevant and immaterial.

Mr. Tonkoff: It is for the purpose of showing malice, Your Honor.

The Court: The objection is sustained.

Q. You had a reporter at the hearing, did you not, Mr. Boas?

A. Which hearing do you refer to?

Q. The first hearing, on January 15th?

A. Yes.

Q. And he was present in the courtroom when the dismissal took place? A. Yes.

Q. Did you make any investigation whatsoever concerning where the hearing was to be held?

A. Myself, no.

Q. Yet the article on May 13th was authorized by yourself? A. The reporter wrote the article.

Q. And you authorized the printing of it?

A. Yes, sir.

Mr. Tonkoff: That is all.

Mr. Greene: I have no questions.

The Court: You may step down, Mr. Boas. You may call your next witness.

Mr. Tonkoff: Mr. Alford, will you take the stand, please. [18]

A. L. ALFORD

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. For the record, will you state your name?

A. A. L. Alford.

Q. Where do you reside, Mr. Alford?

A. Lewiston, Idaho.

Q. And how long have you lived there?

A. About 45 years.

Q. And what is your occupation?

A. Publisher of the Lewiston Morning Tribune.

Q. What is the circulation of that paper?

A. At what time?

Q. Well, in 1953, on May 13th or in that immediate vicinity, about that time?

A. It would have been about 14,500.

Q. And that would mean about how many readers—about 40,000?

A. Well, I presume, it would be according to whatever formula you used to determine the readers.

Q. Have you any idea as to how many, the number of readers you have?

A. That would be a fair estimate, 40,000.

Q. Where does your paper circulate? [19]

A. It circulates primarily in the five north central Idaho counties around here, in Garfield, Asotin

and Southern Whitman Counties in Washington, and in Wallowa County in Oregon.

Q. Mr. Alford, did your paper carry the article which is mentioned in the suit against you, this present suit? A. I presume it did.

(A document handed to the witness.)

Q. Is that the article that you refer to?

A. Yes, sir.

Mr. Tonkoff: I offer this in evidence at this time.

The Court: It may be admitted. I take it that this is Exhibit No. 6.

The Clerk: No. 6.

Q. At the time this article came out, did you authorize or approve it?

A. That is not my function.

Q. What is your function with the paper?

A. The managing editor authorizes the articles.

Q. Who is the managing editor?

A. Mr. Bill Johnston.

Q. Is he here? A. Yes, sir, he is.

Mr. Tonkoff: That's all, Mr. Alford. [20]

Mr. Clements: No questions.

The Court: You got off easy, Mr. Alford.

WILLIAM F. JOHNSTON

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Will you state your full name for the record?

A. William F. Johnston.

Q. And what is your occupation or business?

A. I am managing editor of the Lewiston Morning Tribune.

Q. And do you have control, so to speak, of the articles that come out in the paper?

A. The news department is under my jurisdiction.

Q. Do you recall when this article of May 13 appeared?

A. Yes.

Q. You knew this was coming out, did you?

A. Yes, sir.

Q. And I assume that you authorized the printing of the article?

A. I made arrangements for having the meeting covered.

Q. And you knew what the contents of the article were?

A. I didn't see the article specifically myself before it was [21] printed.

Q. Was there any discussion concerning the article before it appeared in the paper, I mean with your reporters?

A. There was the normal discussion between the

(Testimony of William F. Johnston.)
city editor and the reporters in which I was not involved.

Q. Did you have a reporter present at the hearing on January 15, 1953? A. No, sir.

Q. May I ask you, Mr. Johnston, have you referred to the dismissal since January 15, 1953?

Mr. Clements: May I have that question again, please?

Q. Has the paper referred to the dismissal of the judgment by Judge Borg in the case of State vs. Estes between January 15, 1953, and May 13, 1953?

Mr. Clements: We object to that as being immaterial.

The Court: The objection will be sustained.

Mr. Tonkoff: That's all.

Mr. Clements: No questions. [22]

JOHN K. BORG

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Would you state your name, Mr. Borg?

A. John K. Borg.

Q. And what is your age—how old are you?

A. I will be 72 on the 31st of July.

Q. Are you married? A. Yes.

Q. Do you have a family? A. Yes, sir.

Q. How many children do you have?

A. Three children.

(Testimony of John K. Borg.)

Q. Where do you live now, Mr. Borg?

A. At Longview, Washington.

Q. Did you ever live at Moscow? A. Yes.

Q. When did you first move to Moscow, Idaho?

A. In the Fall of 1936.

Q. Before I forget it, you are the plaintiff in this action, are you not? A. Yes.

Q. What was your occupation in 1936? [23]

A. I started the Western Auto Supply Store here.

Q. How long were you operating that?

A. Approximately four years.

Q. What did you do after that?

A. Well, conditions got such that I could not get merchandise for my store and so I sold out this stock and took over the Richfield Service Station on North Main Street.

Q. How long did you operate that?

A. Approximately a year and a half.

Q. And what other occupations have you followed in Moscow?

A. I worked for a year and a half for Montgomery Ward at Pullman.

Q. That was at Pullman, Washington?

A. Yes.

Q. Did you do any other work here in Moscow?

A. I was the Justice of the Peace.

Q. Did you work for the Elks Club here, John?

A. Yes, sir.

Q. How long did you work for them?

A. About nine or ten years.

(Testimony of John K. Borg.)

Q. When did you become Justice of the Peace?

A. Well, I think it was about in '95 that I was first appointed.

Q. What did you say the year was?

A. It was about in 19——

Q. Wouldn't it be about 1944? [24]

A. About 1944 or 5, yes.

Q. Were you ever elected after that?

A. Yes, sir.

Q. What years, do you remember?

A. I was elected four times.

Q. When was the last time that you were elected Justice of the Peace—do you remember what year you were elected the last time?

A. It must have been in 1952.

Q. Were you also Police Court Judge while you were Justice of the Peace?

A. Part of the time, yes.

Q. Were you acting as Police Court Judge on May 13, 1953; were you working as police judge then?

A. No, I wasn't.

Q. You were just the Justice of the Peace at that time?

A. Yes, sir.

Q. Do you remember how long before January 13th you resigned or gave up the job of police judge?

A. Oh, it was a couple of months.

Q. Where did you hold hearings—preliminary hearings?

A. While I was Justice of the Peace?

Q. Yes.

A. At the courtroom in the Court House.

(Testimony of John K. Borg.)

Q. Do you remember Mr. Estes or Mr. Felton coming to the courtroom [25] on January 15?

A. Yes, sir.

Q. Prior to the 15th, the day before the 15th, tell us what happened concerning this case?

Mr. Clements: Are you referring to any particular date now?

Mr. Tonkoff: Yes, I am; the day before the 15th, which would be the 14th of January, 1953.

Q. On January 14, 1953, will you tell what happened?

A. I was at the Elks, in the courtroom, and the Probate Judge, Judge Martinson, brought down some papers. It was a case that was changed on a change of venue from the Probate Court to my court.

Q. And was the case set for hearing then?

A. Yes, it was.

Q. When was it set for?

A. It was set for nine o'clock the next morning, on the 15th.

The Court: We will take a recess at this time for 15 minutes.

April 5, 1954, 3:05 P.M.

Mr. Tonkoff: Counsel and I have agreed to the admission of this exhibit, if the Court please.

The Court: You may have the exhibit [26] marked.

Mr. Greene: As I understand it, the exhibit is a true and correct copy of all of the docket entries of

(Testimony of John K. Borg.)

the Probate and the Justice Court in the first case of the State of Idaho vs. Murray Estes.

Mr. Tonkoff: That is correct.

The Court: The exhibit may be admitted.

Q. Judge Borg, referring to the third page of Exhibit No. 7, I will ask you if that is a copy of the proceedings that took place, is that a report or is it a copy of your book, your docket book, of what took place; is this a typewritten copy of that?

Mr. Clements: We have agreed to that, Mr. Tonkoff.

Mr. Tonkoff: Very well, thank you, I wonder if I may read this to the jury.

The Court: Yes, I think there are quite a few exhibits that should have been read to the jury.

Mr. Clements: If we may make a suggestion, Your Honor, it occurs to us that if any more exhibits are to be read now, that these two newspaper articles should be read at this time, they are the gist of this action and——

The Court: ——Yes, that is right, I [27] know this, if I was sitting on the jury I wouldn't know what all this is about.

Mr. Clements: We thought if the proceeding was to be in a chronological order that the two newspaper articles should be read to the jury at this time.

The Court: I was wondering if you had photo-static copies of these articles.

Mr. Clements: Yes, we do, we have 14 photo-static copies of each of the articles.

(Testimony of John K. Borg.)

The Court: Then I will let them use the copies, rather than have you read them to the jury I will let the jury read them. They may be handed to the jury, each juror may have a copy if you gentlemen agree that they are correct copies.

Mr. Clements: If you will give me those articles that I gave you, Mr. Tonkoff, I can represent that these are true replicas of the Moscow, Idaho, paper. There are two words that are misspelled and they should be corrected.

Mr. Tonkoff: They can be corrected on the margin.

Mr. Clements: Very well.

The Court: I imagine that this jury is probably accustomed to misspelled words, I know they would be if they ever got any letters from me. Mr. [28] Bailiff, you may hand each juror a copy of each article. This article that I am handing the jury now, I understand, is from the Moscow paper.

Mr. Greene: That is the article in the Daily Idahonian.

The Court: Now, counsel, you may just sit down and relax. I am going to let the jury take their time and read these articles.

(Whereupon, the jurors read documents handed to them.)

The Court: You may proceed, Mr. Tonkoff.

Mr. Tonkoff: I will read Exhibit No. 7, if I may.

The Court: Yes, it may be read to the jury.

Mr. Tonkoff: Ladies and gentlemen of the jury, Exhibit, Plaintiff's Exhibit No. 7 reads as follows:

(Testimony of John K. Borg.)

“In the Probate Court of the County of Latah, State of Idaho. Docket. State of Idaho vs. Murray Estes. January 12, 1953: Richard L. Shoup filed a criminal complaint and deposition against the above-named defendant charging said defendant with the commission of a crime against the State of Idaho, to wit: Assault with a deadly weapon, a felony, alleged to have been committed in Latah County, State of [29] Idaho, on or about the 14th day of December, 1952.

“January 13, 1953: The above-named defendant appeared voluntarily waived the issuance of a warrant of arrest and demanded a preliminary hearing. A preliminary hearing was set for 9:00 o’clock a.m., on the 15th day of January, 1953, before Lloyd G. Martinson, Probate Judge. Said defendant was released on his own recognizance to appear at the preliminary hearing. Lloyd G. Martinson, Probate Judge.

“January 14, 1953: The following order was made and entered: In the Probate Court in the County of Latah, State of Idaho. State of Idaho, Plaintiff, vs. Murray Estes, Defendant. Order disqualifying Judge and changing venue.

“Lloyd G. Martinson, Probate Judge, being satisfied that he is disqualified from acting in the above-entitled matter for the reason that on several and **various occasions prior to his assumption of the duties of Probate Judge** he discussed the matters and things now set forth in the criminal complaint on

(Testimony of John K. Borg.)

file in said matter with various persons, including the complaining witness, Richard L. Shoup, and that during said discussions he expressed his opinion as to the merits of the matters and things now set forth in said complaint. [30]

“Now, therefore, on his own motion, and in furtherance of justice, Lloyd G. Martinson, Probate Judge, does hereby disqualify himself from acting further in the above-entitled matter except as to the doing of those things which shall be necessary in transferring the matter to another magistrate in accordance with law; and it is hereby ordered that the above-entitled matter be, and the same is hereby, transferred to the Justice Court of the Second Justice Precinct, Latah County, State of Idaho, before John Borg, Justice of the Peace. Dated this 14th day of January, 1953. Lloyd G. Martinson, Probate Judge.” And then follows the certificate which I shall not read. On the following page of the same exhibit, “State of Idaho, Plaintiff, vs. Murray Estes, Defendant. The above-entitled case, having been transferred to this Court on a change of venue by Probate Judge Martinson, was held in the courtroom of the Court House in Moscow, Idaho, on the 15th day of January, 1953. As sufficient time had elapsed after 9:00 o’clock a.m., the time set for the hearing and the prosecuting attorney and the complaining witness had not arrived, the defense attorney made motion to dismiss the case as there was no evidence submitted. The motion was sustained and

(Testimony of John K. Borg.)

the case dismissed. John K. Borg, Justice of the Peace."

Q. On the 15th day of January, Judge Borg, were you acting as Police Court Judge at that time?

A. No, sir, I wasn't. [31]

Q. Do you remember how long prior to January you had given up that position or had quit?

A. I couldn't say, but it was at least two or three months.

Q. While you were at the Elks Club and Judge Martinson had handed you the papers that you have referred to, did you see Mr. Alsager, the prosecuting attorney?

A. Yes, sir.

Q. And who is, or who was, Mr. Alsager?

A. He is the prosecuting attorney of Latah County.

Q. At that time, did he advise you as to whether or not he would appear in this case the following morning?

Mr. Greene: I am going to object to that, if Your Honor please, on the ground that it is hearsay and it was not made in the presence of either of the defendants.

Mr. Tonkoff: This, Your Honor, is for the purpose of proving the——

Mr. Greene: ——I will withdraw the objection.

The Court: I think the objection is good but, of course, I think it is all right also to let it in.

Mr. Greene: I have no objection, I will withdraw it.

Q. Did Mr. Alsager advise you as to whether or

(Testimony of John K. Borg.)

not he would [32] appear at the hearing on the following morning, on January 15th?

A. Yes, prior to that just a little bit, he came down to the Elks——

Q. ——You say, prior to this, when do you mean, Judge Borg?

A. Prior to the time of the answer of this question you are asking.

Q. Was that on the 14th or the 15th?

A. It was the 14th, in the afternoon.

Q. Was that after Judge Martinson had handed you the papers? A. Yes, sir.

Q. Now, will you state what was said?

A. Mr. Alsager came into the card room where I was—he called me out in the lobby and he said, “Did you get the papers in the Estes case?” and I said, “Yes, I just got them a few minutes ago.” And then he asked, he said, “Do I have to be there?” And I said, “Well, not as far as I am concerned.” I couldn’t see why I should call him and as he left he said, “Then I won’t come.”

Q. He said, “I won’t come”? A. Yes.

Q. On the 15th the hearing was had, the preliminary hearing was set for hearing? A. Yes.

Q. And who appeared at that time? [33]

A. I went to the courtroom in the Court House and Mr. Estes and Mr. Felton, attorneys, were there. There were some more people there but the only one that I can positively think of now was the Idahonian reporter.

Q. And was he there up to the time that you dis-

(Testimony of John K. Borg.)

missed the case? A. Yes, sir.

Q. And state what happened then?

A. Well, we sat there for what seemed an awful long time and there was not a word said, finally there was a motion by the defendant to dismiss the case—to dismiss the hearing.

Q. Was that motion made by Mr. Estes or Mr. Felton?

A. Mr. Estes. I looked at my watch and it was 15 minutes after nine. I didn't hear any objection to the motion and I waited just a little longer and I finally dismissed the case.

Q. Prior to that time, how long had it been since you had seen or talked to Mr. Estes, prior to this hearing?

A. I couldn't say, but it was at least six months.

Q. Since you had had any conversation or had seen him? A. That is right.

Q. Now Judge, after the 15th of January—along about the 13th, all right, after the 13th of May, you read this article? A. I didn't hear.

Q. After the 13th of May, did you read these articles (indicating) [34] that came out in the Daily Idahonian and the Lewiston Tribune?

A. Oh, yes.

Q. State what, if any, calls you received from people? A. You say calls?

Q. Yes, did you get any telephone calls from people? A. Yes.

Q. Will you state what was said to you at the time of the calls?

(Testimony of John K. Borg.)

Mr. Greene: Now, we object to that as hearsay and not in the presence of any of the defendants and not binding upon them in any way.

Mr. Tonkoff: This, Your Honor, is the exception to the rule.

The Court: I will let him answer, certainly these defendants should not be responsible for any telephone calls they didn't have anything to do with.

Q. What calls did you receive, if any?

Mr. Greene: May I add to the objection that the time and the place and the persons should be furnished before the contents of the call are asked for. This should be done as part of the foundation.

The Court: Yes, that is true, and the parties who made the calls.

Q. Could you identify the persons that called you? [35] A. No, sir.

Q. Did they give you their names?

A. One person did.

Q. And who was that?

A. The name was Kate Smith.

Q. And how long after the 13th did you receive that call?

A. That was not very many days, but I couldn't say the date.

Q. What was said to you?

A. She asked me why I didn't report the money that I had gotten from Estes for disposing of the case—why I didn't report it on my income tax report.

Q. Did you get any other calls?

(Testimony of John K. Borg.)

A. Yes, sir.

Q. Could you identify the people?

A. No, sir.

Q. Would they give you their names?

A. No, sir.

Q. How long after the 13th was this?

A. Well, it was the next week or so, I didn't pay any attention to it much.

Q. What was said to you?

Mr. Greene: Now, we object to this again, if the Court please, no foundation has been laid for these conversations.

The Court: Fix the time and the place. [36]

Mr. Tonkoff: Shortly after or, as he has said, the week after the 13th.

The Court: We have a lot of calls all mixed up here, we don't know which he is talking about.

Q. When was this second call that you referred to, how long after the 13th did you receive it?

A. I cannot tell you the date.

Q. Well, approximately?

A. Well, I think they were all pretty much within the week.

Q. And what was said at that time, Judge Borg?

A. Practically all of them hinged on whether I received any money from Mr. Estes to dismiss his case, and how much money I had received, and if I entered it on my income tax report, and things like that.

Q. Did you receive any anonymous letters?

A. Yes, I got some of them.

(Testimony of John K. Borg.)

Q. And what did you do with them?

A. I threw them away.

Q. Why did you throw them away?

A. Well, the fact was that I was disgusted with the whole thing and I didn't want to have them around.

Q. Can you state—do you remember the contents of those letters, what was said or written to you?

A. They were along the same line that the calls over the phone were. [37]

Q. Now, Judge Borg, did you notice any difference in the attitude of your friends toward you?

A. When?

Q. After the 13th?

Mr. Greene: I am going to have to object to that as being purely conclusion and a self-serving declaration that is called for by that question.

Mr. Tonkoff: Your Honor, in 110 A. L. R., if you care to hear from me.

The Court: Well, in the first place, the defendants could have no way in the world of meeting this evidence. In the second place, there is nothing to show that these articles in the newspaper were the cause of it. This was a matter of public concern and they may have had information from attending the meetings themselves. There is nothing to show that any of these conversations that he had or any of the calls that he received or any of the letters written were on account of the articles appearing in the newspapers. Unless he can lay the foundation that

(Testimony of John K. Borg.)

the articles in the newspapers were responsible for it, of course, it would be objectionable and these men here are charged only with this article that appeared in the papers. I think it is highly prejudicial testimony to be allowed in. He is testifying about something that may [38] not have had anything to do with the articles in the newspapers.

Mr. Tonkoff: Your Honor, I cite you as authority, 110 A. L. R., the holding of the Court's areas that the plaintiff in this type of case can testify as to the change of attitude of his friends and acquaintances toward him.

The Court: I don't think that you can cite me that authority. I will be glad to have it before I rule but I know of no authority to the effect that because they had a mass meeting over here, citizens got together and criticized the action taken, that these men would be responsible for it in any manner. Now, I will look at your authority before I rule because if there is such authority, of course, I don't claim to know all the law and I will be glad to take any authority that you have. You understand my position, it is that these defendants—this was a matter of public concern here in Moscow, they were having mass meetings, people were meeting, it was a matter of general public interest and opinion and whether these newspapers had anything to do with these letters or telephone calls being made—the letters being written or the calls being made to this witness would be just pure speculation and pure guess.

Mr. Tonkoff: Of course, the things that [39]

(Testimony of John K. Borg.)

were said at one of the meetings by one of the defendants, Thomas, were republished.

The Court: Yes, but the party that called him may not have read that article at all, they may have been upset over the dismissal of the case. It may have been some student from the University, or it could have been any of a great many people, and certainly you can't expect this jury to hold these defendants responsible for some other citizen's criticism of the action of this man unless, of course, it came from the newspaper article. I will take any authority you have to offer.

Mr. Tonkoff: So that I will understand Your Honor's ruling, I will refrain from this type of questioning under these circumstances at this time and I will not continue.

The Court: Very well, of course, you understand, I am perfectly willing that you may change my mind if you have any authority to that effect.

Mr. Tonkoff: And as I say, under those circumstances, I will not continue on this line of questioning.

The Court: And the testimony in regard to the telephone conversations and the letters will be stricken and the jury instructed to disregard [40] that.

Mr. Tonkoff: I will excuse this witness for the present until I furnish Your Honor with the authority.

The Court: I will take a recess at this time if you desire.

Mr. Tonkoff: I have another witness that I can go ahead with.

The Court: Do you desire to cross-examine up to this point in the examination of this witness?

Mr. Clements: We do not.

Mr. Greene: No, Your Honor.

Mr. Tonkoff: We will call Judge Martinson.

LLOYD G. MARTINSON

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Will you state your name?

A. Lloyd Martinson.

Q. What is your profession?

A. I am a lawyer and the Probate Judge of Latah County, Idaho.

Q. How long have you acted as such Probate Judge?

A. I was sworn in on January 12, 1953.

Q. How long have you practiced law in this community?

A. I started in 1950, in November of 1950. [41]

Q. Exhibit No. 7, which is on the reporter's desk, is a true and correct copy of your books, is that right?

A. This is a true and correct copy of an instrument which was introduced in evidence in my court on a hearing on a motion.

Q. Referring to the first page of Exhibit No. 7,

(Testimony of Lloyd G. Martinson.)

you set the preliminary hearing of this case before you, did you not? A. Yes, I did.

Q. Where do you hold hearings?

A. At the Court House.

Q. Then after that you disqualified yourself and had Judge Borg hear it? A. Yes, I did.

Q. Where are preliminary hearings held in this county, Judge Martinson?

Mr. Greene: I shall object to that, there is no foundation laid for this witness to testify as to where preliminary hearings are held except those that he holds.

Mr. Tonkoff: If he knows where other courts hear them?

Mr. Greene: Or those that he may have participated in.

Mr. Tonkoff: He has been a practicing [42] lawyer since 1950, he ought to know.

The Court: Of course, I would not admit it on that account. If he knows where other courts are held besides his own court, he may testify.

Q. Do you know where preliminary hearings are held in this County?

A. I know where some of them are held, yes.

Q. Where? A. At the Court House.

Mr. Tonkoff: That's all, Judge.

Cross-Examination

By Mr. Clements:

Q. What do you mean by preliminary hearing?

A. I mean a preliminary examination of felons or persons accused of committing a felony.

(Testimony of Lloyd G. Martinson.)

Q. That is, where a complaint is sworn out before a committing magistrate charging a citizen with the commission of a felony and the committing magistrate holds a hearing to determine whether or not probable cause exists as to whether a crime has been committed? A. Yes.

Q. And the testimony submitted at that kind of a hearing is required to be taken down in shorthand, transcribed and later sent to the district court, is that correct? [43]

A. That is the procedure in my court, yes.

Q. And as the Probate Judge, you are the committing magistrate, aren't you? A. Yes.

Q. Had you ever participated as a lawyer, in a preliminary hearing where a man was charged, a man or woman was charged with a felony?

A. Yes, I had one.

Q. And where was that held?

A. That was before Judge Peterson, my predecessor in the probate court, and that was held in his office.

Q. That was in the probate court's office, wasn't it? A. Yes, it was.

Q. And one of the reasons that preliminary examinations are held, in felony cases, at the Court House is so that you will have access to the official court reporter of Latah County, isn't that correct?

A. Well, I don't know why I hold them there. I just presumed that one of the reasons is that the facilities are better.

Q. Now, this complaint in the matter of the State

(Testimony of Lloyd G. Martinson.)

of Idaho against Estes, matter No. 6292, of which your docket has been introduced here, you are the judge before whom the original complaint was filed on January 12, 1953, is that correct?

A. That is correct, yes. [44]

Q. Was a warrant of arrest issued for the defendant? A. No, there was not.

Q. Isn't it usual where a felony complaint is issued against a citizen that a warrant of arrest is issued?

A. It depends. Sometimes we do and sometimes we don't.

Q. The defendant in that case was charged with assault with a deadly weapon, was he not?

A. Yes, he was.

Q. And you consider that a rather serious crime, do you not?

Mr. Tonkoff: That is objected to as incompetent, immaterial and irrelevant and it is outside of the scope of the direct examination.

Mr. Clements: It is preliminary, Your Honor.

The Court: He may answer.

A. Yes, sir, I would consider it rather serious.

Q. By what means was the defendant brought before you as a committing magistrate?

A. I believe that I telephoned him and told him that a criminal complaint had been filed against him and asked him to appear.

Q. That was on the same day that the complaint was filed? A. I believe so.

(Testimony of Lloyd G. Martinson.)

Q. When did he appear then?

A. He appeared the next day. [45]

Q. Did you set any time that he should appear before you? A. No, I did not.

Q. Then when did you disqualify yourself?

A. It was on the 14th, I believe—my docket shows that, I don't recall exactly—yes, it was on the 14th, the 14th of January.

Q. The complaint was filed on January 12, 1953, according to your docket? A. Yes, sir.

Q. And wasn't that the same day that you, as Probate Judge, and Mr. Alsager, as Prosecuting Attorney, were sworn in? A. Yes.

Q. And how long after you were sworn in was it that the complaint was filed?

A. About 10 minutes after I was sworn in, I would say it was between 10 minutes and a half hour.

Q. What time of the afternoon were you sworn in? A. It was around 2 o'clock.

Q. Had Mr. Alsager ever been Prosecuting Attorney before? A. No.

Q. He had not been Prosecuting Attorney up to that time? A. No, he had not.

Q. You and he were admitted to the bar at the same time, were you not?

Mr. Tonkoff: That is objected to as [46] improper cross-examination and it is outside of the scope of the direct examination.

Mr. Clements: I will withdraw the question to save time.

(Testimony of Lloyd G. Martinson.)

The Court: Very well.

Q. On January 12, the date that this complaint was filed, did you give any information or did you call Mr. Alsager's attention to the filing and the existence of the complaint in your court?

A. I don't recall whether I did or not. Mr. Alsager would know that, I don't recall.

Q. You have no recollection of calling him up or communicating with him on that day?

A. I just don't recall whether I did or didn't.

Q. Do you recall any communication or conversation with him as to whether it met with his approval not to issue a warrant for Mr. Estes on that day?

A. No, I did not.

Q. You did not? A. No, I did not.

Mr. Clements: That is all.

Cross-Examination

By Mr. Greene:

Q. Judge Martinson, you set the time for the preliminary hearing in this matter in your court, in the courtroom [47] of the Probate Court, on January 15?

A. I set it before me, I don't believe that I specified the place.

Q. Will you refer to your docket, please? See if it was not set at the Probate Court?

A. The preliminary hearing was set for 9:00 o'clock a.m., on the 15th of January, before Lloyd G. Martinson, Probate Judge.

(Testimony of Lloyd G. Martinson.)

Q. Do you have a separate courtroom from the district courtroom?

A. I have an office next to the district courtroom, yes.

Q. Is that ordinarily where you hold court?

A. I have my estate hearings there customarily, but I ordinarily hold trials of misdemeanor cases and preliminary examinations in the courtroom, the district courtroom.

Q. On the morning of the 15th of January, 1953, did anybody appear at your courtroom that morning?

A. No, sir.

Q. Did anybody contact you inquiring about where the preliminary hearing was to be had or held?

A. Yes, I think Peggy Estes.

Q. Who?

A. Peggy Estes.

Mr. Clements: Don't you mean Peggy David?

A. Yes, pardon me, Peggy David. [48]

Q. About how long after 9:00 o'clock was it that Peggy David called you?

A. I don't recall.

Q. Did you see Mr. Borg, the plaintiff in this action, that morning?

A. No, I don't recall seeing him.

Q. Did you see Mr. Estes?

A. Yes, sir.

Q. At the courthouse?

A. Yes.

Q. Was that before or after Mr. Borg had dismissed the case, if you know?

A. I don't know, possibly it was before or after. I don't recall.

Q. Can you tell us where the room is where you hold office with reference to the district courtroom

(Testimony of Lloyd G. Martinson.)

that you spoke of where you hold trials and preliminary hearings?

A. If this was the district courtroom (indicating) there is a double door going out here and my office sets there, over that way, you go out these double doors and turn to my office like that (indicating).

Q. There is a hallway? A. Yes.

Q. And your office sets on the north side of the building? A. On the west. [49]

Q. On the west side? A. Yes, sir.

Q. And the County Superintendent's office is across the hall on the south side?

A. It used to be across on the east side.

Q. On the east side, yes. The district courtroom sets then on the north side?

A. Yes, the north side.

Q. And also partly on the east?

A. Yes, it is partly.

Q. Can you tell me how far it is from the door of the district courtroom to the door of the room of your office—let me repeat that, please. Can you tell me how far it is from the door of the district courtroom to the door of your office room?

A. Probably four or five steps, I imagine.

Q. How far is it from the door of the district courtroom to the door of the office that you say was occupied by the County Superintendent?

A. About the same.

Q. Do you have a telephone in your office?

A. Yes, sir, I do.

(Testimony of Lloyd G. Martinson.)

Q. And did you have, on January 15th?

A. Yes, sir, I did.

Mr. Greene: I believe that is all. [50]

Mr. Tonkoff: That is all.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning.

April 6, 1954, 10:00 A.M.

ROY D. GUERNSEY

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. For the record, your name is Roy D. Guernsey?
A. Yes, sir.

Q. Where do you live, Mr. Guernsey?

A. Oniwa.

Q. Are you married? A. Yes, sir.

Q. Do you have a family? A. Yes, sir.

Q. What is your occupation, or rather, what was it in May of 1953?

A. I was a tavern operator.

Q. And where was your tavern?

A. Oniwa.

Q. And do you recollect having read—what papers are distributed [51] in that area where you reside?

A. The Spokesman Review and the Daily Idahonian.

(Testimony of Roy D. Guernsey.)

Q. Do you remember an article in the Daily Idahonian on May 15, 1953? A. Yes.

Q. And do you remember reading the article?

A. Yes.

Q. After you read that article what impression did you derive from it concerning Judge Borg?

Mr. Greene: I will have to object to that as being purely a conclusion on the part of this witness.

The Court: The objection will be sustained.

Q. Did you have any discussion with anybody concerning this article after its appearance in the paper? A. Yes, sir.

Q. And with whom?

A. With Sergeant Clink.

Q. And when did that occur?

A. I think it was the Sunday after that article came out in the paper.

Q. Did he make any reference to that article in the discussion? A. Yes.

Q. Where did that conversation take place? [52]

A. In the tavern.

Q. Will you state what was said concerning the article and concerning the plaintiff?

Mr. Greene: We object to that as hearsay, also that it is a self-serving declaration and no proper foundation is laid and it does not tend to prove any issue in this case.

The Court: The objection is sustained.

Mr. Tonkoff: I would like to make an offer of proof.

The Court: The jury may retire.

(In the absence of the jury).

OFFER OF PROOF

Mr. Tonkoff: The plaintiff offers to prove through this witness that after reading the article he was impressed with the fact that Judge Borg was corrupt and dishonorable and that he derived that opinion solely from reading the article which is the subject matter of this litigation, which article appeared in the Daily Idahonian, May 13, 1953. Plaintiff offers to prove further through this witness that a discussion was had with a Sergeant Clink, attending the university, who was in his place of business the following Sunday, at which time he inquired of this witness if he had read the article and that Sergeant Clink made the statement to this witness that after examining and reading the article there was no [53] doubt but that the judge was dishonest and corrupt.

I base the admissibility of this evidence on 12 A. L. R. Second—I have indicated on the page——

The Court: ——You may hand them to the bailiff and he will bring them to me.

Mr. Tonkoff: In my opinion this is authority to admit this evidence.

The Court: The offer of proof will be rejected.

Mr. Tonkoff: If the Court please, I have a couple——

The Court: ——The Court in this case which you hand me, after commenting on this evidence, says that in character it is generally incompetent and that there was reversible error in admitting it.

Mr. Tonkoff: I have two or three other witnesses who would testify along the same line and in the absence of the jury I would like to make an offer of proof as to their testimony.

The Court: It will be understood that the offer has been made and the same ruling by the Court.

Mr. Tonkoff: Those witnesses, for the record, are Roland Noland, Tom Campbell and Mr. Nerk.

Mr. Clements: I wonder if counsel would give us the addresses of those witnesses. [54]

Mr. Tonkoff: Mr. Noland is a merchant, I understand, at Bovill; Mr. Tom Campbell is from Clarkston and Mr. Nerk is from Potlach. I will recall Judge Borg.

JOHN K. BORG

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Judge Borg, after you read this article, what impression did you receive, or how did you feel?

Mr. Greene: We object to that, if the Court please, as calling for a conclusion of the witness and a self-serving declaration.

Mr. Tonkoff: Well, if it exhilarated him then, of course, there would be no damage, but if it affected him otherwise, there might be.

The Court: Yes, it would be a self-serving declaration, but I will let him answer.

A. Well, it made me feel bad, there had been several articles in the paper prior to that——

(Testimony of John K. Borg.)

Mr. Greene: ——Now, if the Court please, I think this matter was——

The Court: ——Yes, I will not hear from you, Mr. Greene. In view of my other ruling I cannot permit [55] him to testify as to other articles. I examined those other articles that were presented here to the Court and, as I said, there was nothing in them that anyone could take any offense at, they were just publications of news, and even though there is no objection having ruled on that matter I will not permit the testimony at this time.

Q. After the appearance of those articles, would you state if there was any change in the attitude of your friends?

Mr. Greene: Now, I object again. He has reference to a series of articles and there is only one article in issue here.

Mr. Tonkoff: I will confine that to the appearance of these articles in May, May 13th.

Mr. Greene: Then confined to that I have no objection.

Q. After the appearance of the article of May 13, Judge Borg?

A. Well, I noticed a lot of change.

Q. Will you state what that was?

A. Well, people that I had known and had been friendly with and that always had recognized me, after these articles of different kinds appeared, they, when I met them, wouldn't recognize me; they sort of walked away. I spent some time at the Elks

(Testimony of John K. Borg.)

Lodge, and the fellows around there were, well, I would say they were frigid in their attitude—in fact, I asked one of them what was wrong with them. [56]

Mr. Greene: I will have to object again, your Honor, this is calling for a conversation not in the presence of any of the defendants.

The Court: Yes, the objection will be sustained.

Q. Judge Borg, did you feel any differently from a physical standpoint, or from a nervous standpoint?

A. Well, practically from the very first it made me terribly nervous, I lost considerable sleep at night and practically every morning I would wake up with a headache and have headaches pretty near all day.

Q. When did you move to the State of Washington? A. The first part of September.

Q. And prior to moving to Washington were you working, that is immediately before moving to Washington?

A. I was the night clerk at the Washington Hotel in Pullman.

Q. And in the last two or three months before this trial where have you been living?

A. Before?

Q. Yes, before coming here to Moscow for the trial where had you been living?

A. I was living at Longview, Washington.

Q. Do you have any relatives there?

A. Yes, sir.

(Testimony of John K. Borg.)

Q. And who are the relatives? [57]

A. A married daughter.

Q. Now, Judge Borg, at the time of the hearing on the 15th of January, did you know where Mr. Alsager was at the time that Mr. Estes, Mr. Felton, the court reporter and the reporter for the *Idaho-Nian* and other people were in your office, did you know where Mr. Alsager was?

A. No, sir, I didn't.

Q. Judge Borg, what was the size of the room, in the police court, the room where you used to hold police court? A. It was about 12 by 12.

Q. Were there any desks in the room?

A. Yes, two desks there.

Q. Do you recollect how many chairs were in there? A. Approximately six or seven.

Q. As Justice of the Peace did you ever have an office there after you ceased to be police judge?

A. No.

Q. Did you have any office down there at the time of the hearing, on January 15?

A. No, I didn't.

Q. Now, Judge Borg, when a witness does not appear, and I am talking about the complaining witness now, and a motion is made for dismissal, with nobody present to represent the defendant, will you tell what is the proper procedure?

Mr. Greene: We object to that as calling [58] for a conclusion of the witness and invading the province of the Court and the jury.

Mr. Tonkoff: I assume, your Honor, that Judge

(Testimony of John K. Borg.)

Borg is an expert on this and I refer your Honor, respectfully, to Volume 243 of the Pacific, just a moment, I have the citation here, which, in my opinion, allows such testimony to be introduced and——

The Court: I think, Mr. Tonkoff, that it would be error under the circumstances here to admit such testimony and I will sustain the objection.

Mr. Tonkoff: Your witness, that is all.

Cross-Examination

By Mr. Clements:

Q. Mr. Borg, do you hear better through one ear than the other? A. What did you say?

Q. Which ear do you hear the best with—do you hear my voice now? A. I hear some of it.

Q. Do you hear better with one ear than the other? A. Yes.

Q. Which ear is your best ear?

A. This is the bad one (indicating).

Q. The right one is your bad ear?

A. Yes. [59]

Q. And you hear better out of your left ear?

A. Yes, sir.

Q. Are you having any difficulty in hearing me now? A. No, I can hear you.

Q. You understand my words in the voice I am speaking in now, do you not? A. Yes.

Q. When did you say you were first elected Justice of the Peace in Latah County?

(Testimony of John K. Borg.)

A. I didn't get that question.

Q. When did you say you were first elected Justice of the Peace in Latah County?

A. I think it was in 1944.

Q. And when were you next elected?

A. At the following election, 1946.

Q. And were you elected after that time?

A. You say how many times?

Q. Well, how many times were you elected Justice of the Peace? A. Four times anyway.

Q. When was the last time that you were elected? A. It must have been in '52, 1952.

Q. Were you Justice of the Peace on May 13, 1953—pardon me, on January 15, 1953?

A. No.

Q. Now, I want you to be sure to understand my question, [60] were you Justice of the Peace, January 15, 1953? A. No, I don't think I was.

Q. Do you recall the date January 15, 1953? Does that date recall any particular incident to your mind? A. Yes, sir.

Q. What incident does the date of January 15, 1953, recall to your memory?

A. There was a case transferred to my court from the court of Probate, that was on the 14th and the case was set for the 15th, the next morning at 9:00 o'clock.

Q. And were you Justice of the Peace on that date. Were you a Justice of the Peace on January 15, 1953? A. Yes.

(Testimony of John K. Borg.)

Q. And when had you been elected the last time prior to that?

A. Well, it was during the Fall of 1952.

Mr. Clements: I wonder if I may take my chair and move up closer to the witness?

The Court: Yes, you may move right up there, if his left ear is the best you had better stay on that side.

Q. Do you hear me better now, Judge Borg?

A. Yes, sir.

Q. And do you hear my words so that you understand what I am talking about? A. Yes.

Q. How long have you known Murray Estes on January 15, 1953? [61]

A. I came here in 1936. I don't remember just when I met him, but I would say I had known him ever since.

Q. Had he transacted much business in your court as a lawyer prior to January 15, 1953?

A. Not very much.

Q. Had he engaged in the participation of preliminary hearings prior to January 15, 1953, in your court? A. What was that, Mr. Clements?

Q. Had he participated in any preliminary hearings or preliminary examinations in your court prior to January 15, 1953?

A. I didn't quite hear that.

Mr. Clements: I will withdraw the question.

Q. Were you a Justice of the Peace at any time when Mr. Estes was prosecuting attorney of Latah County? A. No.

Q. You did know on January 15, 1953, that Mr.

(Testimony of John K. Borg.)

Estes had been prosecuting attorney of Latah County? A. Yes, I knew that.

Q. And you knew him during the time that he held the office of prosecuting attorney of Latah County? A. What was that?

Q. You knew him during the time that he held the office of prosecuting attorney of Latah [62] County?

A. Well, I guess I knew him when I saw him, that was about all.

Q. How long had you known Mr. Alsager prior to January 15, 1953?

A. Well, perhaps a couple of years.

Q. Had he ever conducted any business in your court before you as Justice of the Peace, as a lawyer? A. Yes, sir.

Q. How many occasions, to the best of your memory?

A. One that I remember especially, I don't know whether it was more than that or not.

Q. And was that a civil or a criminal matter?

A. A civil matter.

Q. Do you recall any criminal matter that he and Mr. O'Donnell appeared before you?

A. I am pretty sure they did.

Q. You are sure that he and Mr. O'Donnell did appear before you in a criminal matter?

A. I would say that he must have.

Q. At the times that he did appear before you as Justice of the Peace where did you hold court?

A. When he appeared?

(Testimony of John K. Borg.)

Q. At the time that Mr. Alsager transacted business before you as Justice of the Peace did you hold court?

A. This particular case was held in the Police Courtroom.

Q. In the City Hall? [63] A. Yes, sir.

Q. In Moscow, Idaho? A. Yes, sir.

Q. Did you ever have any business or transact any business with Mr. Alsager, as Justice of the Peace, up at the Latah County Courthouse prior to January 15, 1953? A. I don't think so.

Q. Do you know what date Mr. Alsager had been sworn in as prosecuting attorney in January, 1953?

A. What was that?

Mr. Clements: I will withdraw that question.

Q. What date in January was the first day that you had any conversation with Mr. Alsager pertaining to the case of the State of Idaho vs. Murray Estes?

A. On the afternoon of the 14th of January.

Q. And where did that take place?

A. It was at the Elks Lodge.

Q. At about what time of the day?

A. About four in the afternoon.

Q. How long had Mr. Alsager been prosecuting attorney at that time?

A. Approximately two weeks, I would guess.

Q. Do you know when he was sworn into office—when he took his oath as prosecuting attorney of Latah County? [64]

A. You say where his office was?

(Testimony of John K. Borg.)

Q. No, when he was sworn in as prosecuting attorney? A. I don't recall.

Q. You at that time knew that Mr. Martinson was the Probate Judge of Latah County?

A. Yes, sir.

Q. And you knew that Mr. Martinson on January 14 at the time he delivered papers to you, he knew that he had been in office only a couple of days? A. Yes, sir.

Q. And you knew that both Mr. Martinson and Mr. Alsager had been sworn into office on January 12, 1953?

A. That is possible, but I didn't try to keep track of those dates, but I suppose it was on that day.

Q. Whatever date it was, you did know that these two young men had only been public officers for a day or two? A. Yes.

Q. And you knew that was their first term in their respective office, as probate judge and prosecuting attorney? A. Yes.

Q. And you knew that they were inexperienced in the law?

Mr. Tonkoff: That is objected to as calling for a conclusion.

A. I don't suppose——

Mr. Clements: Just a minute, that has been [65] objected to.

The Court: He may answer.

A. I don't suppose they had any experience in these particular offices.

(Testimony of John K. Borg.)

Q. Now, on January 15, 1953, you had been a Justice of the Peace for several years in Latah County? A. Yes.

Q. Have you any idea how many preliminary examinations you had conducted up until that time?

A. Three or four or five, I cannot tell exactly.

Q. You had held the office of Justice of the Peace while Mr. Maury O'Donnell was the prosecuting attorney? A. Yes, sir.

Q. And he had business before you as Justice of the Peace? A. Yes, sir.

Q. As prosecuting attorney? A. Yes.

Q. You had transacted quite a lot of business with Mr. O'Donnell, hadn't you, that is, as Justice of the Peace?

A. Not very much I wouldn't say, however, we had some.

Q. Do you recall who was Mr. O'Donnell's predecessor in office, who was the prosecuting attorney of Latah County before Mr. O'Donnell?

A. I think it was Mr. Estes.

Q. Do you recall conducting any preliminary examinations while [66] Mr. Estes was prosecuting attorney? A. No.

Q. When was the first contact or association that you had with Probate Judge Martinson about this case?

A. The first time was on the 14th, the afternoon when he gave me the papers.

Q. On January 14, 1953, did you have any busi-

(Testimony of John K. Borg.)

ness in the city of Moscow for the transaction of business? A. No, I didn't.

Q. You were not engaged in any other business at that time, were you? A. When?

Q. On January 14, 1953?

A. Any other kind of business, you mean?

Q. Yes. A. No, I wasn't.

Q. The only other occupation or business that you were occupying at that time was Justice of the Peace? A. Yes, sir, I think that is right.

Q. And the only place that you conducted your business as Justice of the Peace in civil matters and misdemeanors was at the Police Station, wasn't it?

A. Yes.

Q. You transacted quite a little business as Justice of the Peace down at the Police Office? [67]

A. Yes, sir.

Q. Is that where you held your small claims court? A. Yes, sir.

Q. And isn't that where you presided over cases where people were being tried for misdemeanors?

A. You mean traffic violations and such?

Q. Do you understand what a misdemeanor is?

A. It is a lesser case than a felony or something like that.

Q. What kind of a lesser case than a felony?

A. Well, the penalty is not as severe.

Q. Do you know the difference in law between a misdemeanor and a felony, what distinguishes the crime as a misdemeanor and what distinguishes it as being a felony?

(Testimony of John K. Borg.)

Mr. Tonkoff: We object to that as not being proper cross-examination, your Honor. It is not within the scope of the direct.

The Court: I think it goes to the question that we have before us, he may answer.

Mr. Clements: I will have the question read to you, Mr. Borg. Will you read it, Mr. Reporter?

(Question read by reporter.)

A. There is a difference in the jurisdiction, if it is a civil matter and it involves more than \$300.00 it would come outside of the jurisdiction of the Justice of the Peace, or the amount that is stipulated in the Code consisting of,—I [68] cannot think of the term I want to use.

Q. What jurisdiction do you have as Justice of the Peace over criminal matters, what did you understand your jurisdiction to be as Justice of the Peace in criminal matters on January 15, 1953, where people were charged with a crime?

A. I didn't get that.

Q. What was Mr. Estes charged with in your court on January 14, 1953, what kind of a complaint was filed against him, what crime was he accused of having committed?

A. He was charged with accosting someone with a deadly weapon.

Q. Is that all you know about that crime? What jurisdiction did you have over that crime, what did you understand that your duty was when it came before you?

(Testimony of John K. Borg.)

A. When a case like that comes before the Justice of the Peace the procedure is to find out—in other words, there has to be a preliminary hearing.

Q. What is a preliminary hearing for so far as the Justice of the Peace is concerned?

A. It gives the defendant a chance—the purpose of it is to find out whether he is really a felon or not, I guess, or to find out if he wasn't.

Q. Exactly what did you understand your duty to be, did you have to determine whether Mr. Estes was guilty or was there another premise that you were supposed to determine? [69]

A. Well, it would be up to the Justice of the Peace according to the testimony or what have you, whether or not it would be justifiable to dismiss the case to have it transferred to the district court.

Q. On January 15, 1953, what did you consider your duty to be relative to the protection of the interest of the State of Idaho—the State of Idaho was the party plaintiff in that action, was it not?

A. Yes.

Q. And the proceeding was being prosecuted in the name of the State of Idaho by the prosecuting attorney of Latah County, wasn't it?

A. Yes.

Q. And what did you consider your duty to be there in determining the interest of the State of Idaho in that charge?

A. The interest of the State of Idaho was to prove whether or not the defendant was guilty of the charge.

(Testimony of John K. Borg.)

Q. Is that what you understood your duty to be on that day? A. Yes.

Q. Had you ever read the Statute prior to that date as to what your duty was on that day and as to what it actually consisted of?

A. I read some, not extensively.

Q. As a matter of fact, you did know on that date that the only official duty you had, required you to examine the evidence [70] that was submitted and to determine whether there was probable cause to believe that a crime had been committed. You knew that you had no jurisdiction to determine whether the defendant was guilty of a crime or not and you knew that all you had to do and what your official position was, was to listen to the testimony put on by the State of Idaho and determine as Justice of the Peace, whether there was probable cause to determine whether a crime had been committed, did you know that or didn't you?

A. If the complaint was a fact then there would be no question about it.

Q. What was that, Mr. Borg?

A. If the complaint was a fact there would be no question, but as Justice of the Peace I didn't know whether that was a fact or not.

Q. You knew that the complaint charged a very serious crime, didn't you? A. Yes, sir.

Q. And you knew and regarded, as a citizen and as a judge, that the crime of assault with a deadly weapon was a very serious felony charge, didn't you? A. Yes, sir.

(Testimony of John K. Borg.)

Q. And you knew that charge had been laid against a citizen by the officers of the State of Idaho, didn't you? A. Yes, sir. [71]

Q. And you dismissed that charge without hearing any evidence, on the motion of the defendant, didn't you?

A. On what kind of a motion, did you say?

Q. On the motion of the defendant. When Mr. Felton got up and stated that the prosecuting attorney and the witness were not there and made the motion to dismiss you granted that motion, didn't you?

A. It was something like that, yes.

Q. And you didn't send the sheriff to try to locate the prosecuting attorney, did you?

A. No, sir.

Q. And you didn't go to Mr. Martinson's telephone or endeavor to get to any other telephone to determine where Mr. Alsager was, did you?

A. No, sir.

Q. And you had a telephone conversation with Mr. Alsager at eight o'clock that morning, didn't you? A. Yes, sir.

Q. And Mr. Alsager told you at eight o'clock that morning that he would be at the hearing at nine o'clock, didn't he? A. Yes, sir.

Q. And you didn't tell Mr. Alsager at eight o'clock that morning where this hearing was to be held, did you?

A. No, he didn't ask and I didn't tell him. I don't think that I told him.

(Testimony of John K. Borg.)

Q. And you didn't tell Mr. Alsager, at four o'clock the day [72] before, at the Elks Club, where you were going to hold that hearing, did you?

A. No, I didn't, the time and the place was set in the complaint or when the case was transferred on an affidavit of prejudice from the court of probate to my court and I had been served with the papers. I took them out of my pocket and I don't know whether Mr. Alsager looked at them or not.

Q. When Judge Martinson delivered those papers to you between four and five o'clock on the afternoon of January 14, you read them, didn't you?

A. Yes.

Q. And in those papers that you read, you saw the case was set for hearing at the Probate Court, didn't you?

A. At the Probate Court?

Q. Yes, at the Probate Court, you saw that, didn't you?

A. My impression was that it was at the courtroom at the Courthouse.

Q. Didn't you read those papers, Mr. Martinson turned over to you that afternoon?

A. Yes.

Q. Before you talked to Mr. Alsager?

A. I looked them over right away when I got them.

(Exhibit No. 7 handed to witness.)

Q. Will you examine that document which you have, examine it carefully and say whether you read the original of that [73] prior to the time that we are talking about now?

(Testimony of John K. Borg.)

The Court: You might call his attention to any particular part there that you have reference to, Mr. Clements.

Mr. Clements: I will ask one other question.

Q. After reading Exhibit No. 7 now, do you think that you examined those papers at four o'clock on January 14, 1953? A. Yes.

Q. Mr. Alsager came over to you at the Elks Temple, as I understand? A. What was that?

Q. You met Mr. Alsager at the Elks Temple, is that right? A. Yes.

Q. Did he have a law book with him at that time?

A. I don't believe so.

Q. Would you say that he didn't?

A. No, I wouldn't say whether he did or didn't, he may have had.

Q. I understand that you had a conversation with Mr. Alsager about this case out in the lobby?

A. Yes, sir.

Q. And what did he say to you and what did you say to him on that occasion?

A. What did he say to me?

Q. Yes.

A. In his exact words—after I think I gave him the papers, [74] as far as I recall now and he said, "That is a hot potato. Do I have to be there?" And I said, "As far as I know you don't have to be there, I don't know of any reason why I should tell you to be there."

Q. What else was said?

(Testimony of John K. Borg.)

A. That was about all there was to it and then he walked out and he said, "I won't be there."

Q. But he did call you the next morning and said that he would be there at the hearing?

A. What was that?

Q. Didn't he call you at eight o'clock the next morning and tell you that he would be at the hearing?

A. Yes.

Q. Are you sure that he didn't tell you that he would be there, that afternoon?

A. Am I sure of what?

Q. Are you sure that Mr. Alsager didn't tell you on the afternoon of the 14th that he would be at the hearing?

A. Am I sure that he told me that he would not be there?

Q. Yes. A. Yes, sir.

Q. Which did he tell you, that he would be there or that he would not be there, what is your memory of it?

A. On that afternoon?

Q. Yes, when he talked to you? [75]

A. He turned around and said that he would not be there and then he walked out.

Q. Now, have you related all of the conversation that took place between Mr. Alsager and you on the afternoon of January 14th at the Elks Temple at Moscow, Idaho?

A. I think so.

Q. I want to ask you if it is not a fact that at that time and place if you didn't say to Mr. Alsager that he would be a damn fool to go into this case and that if he did he would be committing political

(Testimony of John K. Borg.)

suicide, or words to that, in substance and effect as I have related?

A. I don't recall anything to that effect, I don't recall that he said anything to that effect, no.

Q. I am asking if that is not what you said to him?
A. No, sir.

Q. Would you say that you did not say it to him at that time and place?

A. What was that?

Q. Would you say that you did not say those words, in substance and effect, to him at that time and place?

A. I would say positively that I did not say those words.

Q. Was Mr. Maury O'Donnell's name mentioned in that conversation between you and Mr. Alsager in the Elks Club on January 14, 1953?

A. No, sir. [76]

Q. I will ask you if that time you did not also say to Mr. Alsager that Maury O'Donnell never did show up at a preliminary hearing and there was nothing in the law that a Justice of the Peace was required to know about the law, did you make that statement to Mr. Alsager or words in substance to that effect?
A. No, sir.

Q. Do you recall now whether Mr. Alsager had with him a copy, during that conversation?

A. Did Mr. Alsager have the Code?

Q. Yes.

A. I would say that he didn't although I would not state positively that he didn't.

(Testimony of John K. Borg.)

Q. What were you doing down town on the morning of January 15, around 8:30 o'clock.

A. So far as I remember I don't know whether I was down town or not.

Q. Do you remember walking past Clarence Johnson's Barber Shop—you know where that barber shop is, don't you? A. Yes, I do.

Q. Do you remember walking past that barber shop, the barber shop of Clarence Johnson around 8:30 that morning, going in a westerly direction?

A. I don't recall but I wouldn't say that I didn't, but I just don't recall. [77]

Q. You would deny that you walked past Clarence Johnson's Barber Shop around 8:30 o'clock that morning? A. Me deny it?

Q. Yes, you would not deny that, would you?

A. No, sir, I would not deny it.

Q. Will you state whether or not you were down town in Moscow that morning, after Mr. Alsager had called you and before you went back up to the courthouse?

A. I am almost positive that I wasn't down town.

Q. Do you have an automobile or were you driving an automobile at that time? A. Yes.

Q. Can you definitely recall whether you were or were not down town before you went to the courthouse that morning?

A. As far as I recall I wasn't. As far as driving a car I don't think that I did.

(Testimony of John K. Borg.)

Q. Do you recall riding up to the courthouse that morning with any other person?

A. No, I don't.

Q. Will you say that you didn't ride up in an automobile, to the courthouse, with any other person, that morning, from any place down town up to the courthouse?

A. I say that I don't remember, no, I don't remember that I did and I am quite sure that I didn't.

Q. What time did you arrive in the district courtroom on the [78] morning of January 15?

A. The case was set at nine o'clock and I think that I was up there five or ten minutes prior to that.

The Court: I have naturalization hearings set at 11:00 o'clock and it is necessary for me to have them at that time, so I will recess this trial now for 15 minutes. We will be in recess for 15 minutes on this trial and the jury may retire if they desire, however, they need not leave the courtroom during the hearing on naturalization.

April 6, 1954, 11:15 A.M.

Q. Referring to the morning of January 15, 1953, Mr. Borg, at the Courthouse, what time did you arrive at the Courthouse that morning?

A. Approximately five or ten minutes before nine.

Q. What arrangement did you make with the officials up there to hold this preliminary hearing?

A. I didn't make any arrangement.

(Testimony of John K. Borg.)

Q. Did you have any contact with Judge McQuade about using the courtroom that morning for this hearing? A. No, sir.

Q. Did you contact the janitor or Mrs. Babcock about using the courtroom that morning? [79]

A. No, sir.

Q. Do you recall whether Judge McQuade's chambers were locked that morning?

A. What was that?

Q. Do you know where Judge McQuade's chambers are located, you know that he has an office back of the bench? A. Yes.

Q. You have been in that room? A. Yes.

Q. Do you know whether those doors were locked that morning? A. I would not know.

Q. Did you see Judge Martinson while you were there that morning, up at the Court House?

A. You ask if I saw him?

Q. Yes. A. No, sir.

Q. Who arrived or who was present in the district courtroom at the time you entered it?

A. I don't recall, but I believe that Mr. Estes and Mr. Felton were there and a few more people. Whether they were there when I came in or not, I wouldn't know now, I can't say.

Q. Who do you recall as being present besides Mr. Estes and Mr. Felton?

A. Who was there?

Q. Yes, who do you recall as being present in the courtroom [80] besides Mr. Estes and Mr. Felton?

(Testimony of John K. Borg.)

A. I wasn't paying too much attention but I know that the Idahonian reporter was there.

Q. Do you recall his name?

A. No, I don't.

Q. He called you up that morning, about 8:00 o'clock, to ask you where you were going to have this hearing, didn't he?

A. Where we were going to have it?

Q. Yes.

A. He called sometime, either that morning or the night before.

Q. As a matter of fact, that was just about the time that you had the call—first, let me ask you, did he ask you where you were going to hold the hearing? A. Yes.

Q. And that was about the time that you had the call from Mr. Alsager, was it not?

A. Yes, I imagine that it was.

Q. Where did you tell the newspaper reporter that you were going to hold this hearing?

A. I told him that it would be held in the courtroom at the Courthouse.

Q. What position did you occupy in the courtroom? Did you sit on the judge's bench or the chair behind the bench? A. No, sir.

Q. Do you recall anybody else being with Mr. Estes and Mr. [81] Felton in the courtroom?

A. With them?

Q. Yes. A. No, I don't think that I do.

Q. Do you know Mr. Estes' secretary, Mrs. Marjorie Moore? A. Yes, I know her.

(Testimony of John K. Borg.)

Q. Was she there that morning?

A. It seems to me that she was; I am quite sure that she was there.

Q. Do you recall seeing and hearing Mr. Felton having a conversation with the newspaper reporter, Mr. Casen, about the time?

A. No, I didn't hear him have any conversation with him.

Q. Did you hear Mr. Felton ask Mr. Casen to check his watch with the court's clock?

A. Did I hear that question?

Q. Yes. A. No, sir, I didn't hear it.

Q. Did you see Mr. Felton at any time prior to the time that he moved this dismissal, looking at his wrist watch or at the court's clock?

A. No, sir.

Q. Did you hear him make the statement that it was now 9:07 and in view of the prosecuting attorney failing to appear with his witness that he moved a dismissal of it? [82]

A. No, I don't think I did.

Q. How far would Mr. Felton and Mr. Estes be sitting from you at the time that you convened your hearing there?

A. Well, it would be approximately about where the last chair in the jury section is, where that lady is sitting (indicating).

Q. And were you as hard hearing then as you are now? A. Not quite.

Q. Are you or were you acquainted, at that time, with the deputy sheriff of Latah County named E.

(Testimony of John K. Borg.)

D. Hill? A. If I was acquainted with him?

Q. Yes, were you acquainted with him at that time? A. I imagine I was.

Q. Do you recall meeting him when you came down from the courtroom that morning?

A. I don't, no.

Q. Would you say that you did not meet Mr. Hill at some place in the Courthouse or immediately back of the Courthouse after you adjourned your hearing that morning?

A. No, I don't recollect meeting him.

Q. Would you say that you did not meet him?

A. No, I said that I didn't know.

Q. To refresh your recollection, don't you remember meeting Mr. Hill after you had adjourned your hearing and he told [83] you that they had telephoned from the Police Station and that Mr. Alsager and his witness were at the Police Station and they wanted you to come down?

A. No, the first I knew of it was——

Q. Just a minute, just answer my question. Would you say that Mr. Hill did not tell you that that morning—how do you want your answer—that he didn't tell you or that you don't recollect?

A. Whether I saw Mr. Hill?

Q. Yes.

A. I am quite sure that I didn't see him.

Q. You did go to the Police Station immediately after the hearing? A. What was that?

Q. You did go to the Police Station immediately after the hearing at the Courthouse, didn't you?

(Testimony of John K. Borg.)

A. Yes.

Q. How did you go down there? How did you get from the Courthouse back to the Police Station?

A. I imagine that I walked down there, as far as I know.

Q. Do you know of a lady named Mrs. Peggy David? A. What?

Q. Do you know Peggy David?

A. Yes, she was the clerk in the Police Department, is that the one that you mean? [84]

Q. Yes. A. Yes, I know her.

Q. Did you see her at the Police Station when you went down there that morning?

A. I saw her, yes.

Q. When you got to the Police Station, were there many people there?

A. Yes, quite a bunch there.

Q. Did you have any conversation with Mr. Alsager that time? A. Yes.

Q. Will you tell us what you said to him and what he said to you?

A. He asked me something about what was done or something to that effect and I told him that as far as the case was concerned it was dismissed.

Q. As a matter of fact, when you first went there didn't Mr. Alsager say to you, "Judge, will you step aside here, I want to talk to you about how we will handle this case?"

A. I don't think so because the very first thing

(Testimony of John K. Borg.)

that happened was that I told him that the case had been dismissed.

Q. Don't you recall Mr. Alsager requested you to step aside to discuss the case with him and you said, "There is no case because I have dismissed it, you didn't show up at the Courthouse"?

A. The thing I remember for sure is when I said that the [85] case was dismissed he said, "You can't do that."

Q. What else did he say that you can recall?

A. As far as I can recollect there wasn't much more said.

Q. Don't you remember him saying at that time that if that was the way you were going to conduct the business for the State of Idaho that you could never expect him to bring any more state business into your court?

A. No, sir; I don't recollect that he did.

Q. When did you arrive back at the Police Station that morning?

A. When?

Q. Yes; about what time would you say that you arrived back at the Police Station on the morning of January 15?

A. Well, I was in the Assessor's Office when I got the call.

Q. What call?

A. It was a call from Mr. Alsager at the Police Station.

Q. On the morning of January 15?

A. Yes.

Q. . And what was that conversation?

(Testimony of John K. Borg.)

A. It wasn't very long after the case was over, it was possibly 20 or 25 minutes after nine.

Q. You say that after the case was over Mr. Alsager got you on the telephone at the Assessor's Office?

A. Yes.

Q. What did Mr. Alsager say to you at that [86] time?

A. Well, he wanted to know why I didn't appear or something to that effect.

Q. Now, just reflect back and tell us the best you can, to the best of your recollection, what Mr. Alsager said to you at that time and what you said to him in this telephone conversation that you refer to?

A. Well, the sum and substance of it was that he wanted to know why I didn't come down there.

Q. Now, are you positive that you had a telephone conversation with Mr. Alsager at the time and the place that you refer to?

A. Yes, sir.

Q. And you don't recall any conversation about that time with the deputy sheriff, Mr. Hill?

A. No, sir; he may have been the one that told me that there was a telephone call for me but I cannot say as to that.

Q. You say that Hill may have been the one that told you there was a call for you?

A. It could have been, yes.

Q. Is it not possible that Mr. Hill was the one that told you to go down to the Police Station, that Mr. Alsager and his witnesses were waiting there, instead of Mr. Alsager telephoning to you?

(Testimony of John K. Borg.)

A. No; the first I knew of it was over the telephone.

Q. How long did you stay in the Police Station after you [87] got back down there?

A. After I got down there?

Q. Yes.

A. Not very long; I don't think it was over five minutes.

Q. Did you discuss at that time with Mr. Alsager any possible procedure to correct the thing that you had done that morning when you knew that he was there and had his witnesses?

A. No, sir.

Q. You just took the position that you had dismissed the case and that was the end of it, is that correct?

A. Yes; there was nothing said about anything else.

Q. Did you inquire of him as to how you got mixed up on the place and what you could do about the case?

A. I don't believe there was anything said about it.

Q. After you left the Police Station, during the rest of the day, there was a considerable amount of talk around town about the case being dismissed?

A. Yes.

Q. In fact there was a great amount of talk, wasn't there?

A. There was quite a bit. I don't know whether it all got to my attention or not.

Q. You were conscious of the fact that you were

(Testimony of John K. Borg.)

being severely criticized for dismissing the case, even in that early afternoon? [88]

Mr. Tonkoff: That is objected to as calling for a conclusion of the witness and it is outside of the direct examination.

The Court: He may answer.

A. Yes.

Q. Do you recall, Mr. Borg, reading the newspaper articles in the Spokesman Review on the morning of January 16, 1953, about your dismissal of this case?

A. There were several articles; as far as the dates, I can't say.

Q. Well, shortly after you dismissed this case, within a day or two were hearing public rumors of criticism of your action, were you not?

A. A day or two later there was an article in the Spokesman Review.

Q. And you wrote a letter to the Spokesman Review about that article, did you not?

A. Yes, sir; I did.

Q. And you sent a copy of that letter to the Daily Idahonian, didn't you? A. Yes, sir.

Q. Mr. Borg, handing you what has been marked for identification as Defendant's Exhibit No. 8, I will ask you if that is not a copy of a letter that you left with the Daily Idahonian, [89] the original of which you sent to the Spokesman Review?

A. Yes, sir.

Q. You better read that, Mr. Borg, to make sure

(Testimony of John K. Borg.)

of it. You recognize that as being written on your typewriter? A. Yes, sir.

Mr. Clements: I now offer in evidence Exhibit No. 8, which has been marked for identification, as a part of the cross-examination of this witness.

Mr. Tonkoff: I have no objection.

The Court: It may be admitted.

Mr. Clements: May I read the exhibit now to the jury?

The Court: Yes, you may.

Mr. Clements: This is a letter dated January 16, 1953: "Editor, Spokesman Review: In your paper this morning you had an article regarding a case in my court, that of the State of Idaho vs. Murray Estes. In the heading of the article you state that the case was scrapped and that the justice changed courtrooms, leaving the impression making use of the courtroom at the Courthouse instead of the Police Station was a deliberate move to hamper justice to be done.

"At this juncture I would like to inject the following: The newspapers are all and at all times clamoring for free press, but they are prone to [90] forget that in accepting that privilege they are also accepting a responsibility, that of printing all the news, and if I had been interviewed by your scribe I could have assisted considerably in getting this straight.

"This is the fact: In the first place, from what I know about Mr. Estes I do not think he is the kind of man that took a gun around town without a

(Testimony of John K. Borg.)

reason and, furthermore, I do not think there is a man, woman or child in the town of Moscow that is afraid to go about their business or pleasures for fear of being molested by Mr. Estes. Now, then, this being the case, I thought perhaps erroneously, but certainly with reason, that the complainant had changed his mind and had decided to drop the case by staying away, which had been done many times in my eighteen years as a Justice of the Peace. As to changing the place for holding the hearing, there was no change, which I could have told your scribe had he taken the bother to see me.

“On all my important cases, where the attendance would supposedly be large, I have held them at the Courthouse, rather than at the small room in the Police Station.

“Just why the Prosecuting Attorney, Mr. Alsager, and myself did not get together on the place for holding the hearing, I do not know. Neglect on the part of both of us perhaps.

“Several persons called up to find out where [91] the hearing was to be, including the Idahonian correspondent, and I told them all that it would be held in the courtroom at the Courthouse.

“Lastly; I certainly wish you would use a little more care in your everlasting search for sensational headlines and headings. John K. Borg, 616 East 7th, Moscow, Idaho, Justice of the Peace.”

Q. Now, Mr. Borg, you say that immediately after you dismissed this case you became conscious of a lot of criticism existing?

(Testimony of John K. Borg.)

A. What was that question?

Q. You referred to the fact that immediately after you dismissed this case on January the 15th you became conscious that there was a lot of talk and criticism against you? A. Yes.

Q. Did that criticism and what you were conscious of continue up to May 13?

A. For a considerable length of time.

Q. You recall when the newspaper articles were published, don't you? A. What was that?

Q. You recall the dates when the newspaper articles were published? A. What date?

Q. Yes, is that date in your mind now? [92]

A. No, sir.

Q. Assuming that the newspaper articles came out, the articles that are the subject of this lawsuit, one in the Daily Idahonian and one in the Morning Lewiston Tribune on May 13, 1953—assuming that was the date, did that criticism and public talk continue up to the date that these articles were published? A. Yes, sir.

Mr. Clements: That is all.

Redirect Examination

By Mr. Tonkoff:

Q. Judge Borg, you make the statement in this letter that you have been a Justice of the Peace for 18 years; had you served as a Justice of the Peace anywhere else? A. Yes, sir.

Q. Would you tell the jury where that was?

(Testimony of John K. Borg.)

Mr. Clements: We object to that as being immaterial. A. Westby, Montana.

The Court: The answer is in the record and it may stand.

Q. Any place else? A. No, sir.

Q. How long did you serve at Westby, Montana? [93]

A. Approximately eight years or some such matter.

Q. Were you ever a Justice of the Peace in North Dakota? A. No, sir.

Q. Judge, you also make a statement in this letter that there has been other occasions when the complaining witness did not appear at a hearing, what did you do in those instances, in the case where the witness, the complaining witness did not appear?

A. If there was a preliminary hearing?

Q. Yes.

A. The case would be transferred to the district court.

Q. Judge Borg, I said in cases where you said that in 18 years a lot of the complaining witnesses did not appear or didn't want to press the charge, now in cases where the complaining witness did not appear at a preliminary hearing what did you do, what is the order you would make and what is the procedure?

Mr. Clements: We will object to that, if the Court please. I don't think that it states the facts correctly, that there have been many cases in 18 years.

(Testimony of John K. Borg.)

Mr. Tonkoff: That is what he says in this letter, and it is the defendant's exhibit and I think that I should be allowed to examine from it.

The Court: I will let you go ahead. [94] I think the jury can weigh the matter.

Q. Did you understand my question, Judge Borg?

A. Not exactly.

Q. When a complaining witness does not appear at a preliminary hearing what do you do when you are sitting as judge?

A. The case is dismissed.

Q. Is that what you did in this instance?

A. Yes.

Q. Is that the procedure that you follow?

A. Yes.

Q. How many people were at the Police Station?

A. When?

Q. When you arrived at the Police Station?

A. After this hearing?

Q. Yes.

A. I don't know, there was a lot of people there.

Q. Where were you when the Idahonian Reporter called you? A. At home.

Q. And where were you when Mr. Alsager called you?

A. I am sure it was in the Assessor's Office at the Court House, it was in one of those offices there.

Q. Did you see Mr. Estes before you went to the courtroom at the Courthouse? A. No. [95]

Q. Where did you first see him that morning?

(Testimony of John K. Borg.)

A. The first time I saw him was at the courtroom on the morning of the 15th.

Q. In all your experience as a Justice of the Peace did you ever call the sheriff or the prosecuting attorney to appear before you at a preliminary hearing? A. No, sir, I never did.

Q. A preliminary hearing?

A. I never did.

Q. Do you know of any practice or procedure where the Justice calls the sheriff or the prosecuting attorney to appear at a hearing scheduled before the Court?

Mr. Clements: We object to that as incompetent, irrelevant and immaterial and not proper redirect examination. .

The Court: The objection is well taken, it is well understood what the Court is supposed to do when a case comes up.

Mr. Tonkoff: Counsel inquired of this witness whether he had called the sheriff or Mr. Alsager or anyone else.

The Court: Yes, and that is all there is to it, he said that he didn't.

Q. When did you first become acquainted with Mr. Alsager?

A. I think I met him while he was going to school. [96]

Q. What was the situation of the hearing that you had at the Police Court, what kind of a case was that?

A. Well, that was—do you mean whether it was a civil or a criminal case?

(Testimony of John K. Borg.)

Q. Well, I don't know. Mr. Clements inquired of you if you ever held a hearing at which Mr. Alsager was present at the Police Court, and I am asking, what kind of a case was that?

A. I remember distinctly that it was a civil case.

Q. Was that related or was that anything like a preliminary hearing where the defendant is charged with a felony? A. Was it what?

Q. Was that case similar to a preliminary hearing where the defendant is charged with a felony?

A. It would be similar, yes.

Q. Well, did you ever hold your preliminary hearings at the Police Station?

A. The distinction there is quite varied and complicated.

The Court: I don't think he got your question, Mr. Tonkoff.

Mr. Tonkoff: I don't believe that he did.

Q. What I asked you, Judge, was, did you ever hold a preliminary hearing at the Police Station?

A. I don't think I had any State cases with preliminary hearings, at least, I know when things like that came up [97] during Maury O'Donnell's term as prosecuting attorney he always kept me informed and we got together on everything.

Q. When did you decide to leave the State of Idaho and go into Washington?

Mr. Greene: I think that is improper redirect examination, Your Honor.

Mr. Tonkoff: It is preliminary, Your Honor.

(Testimony of John K. Borg.)

The Court: I believe you examined him on that one time, but I will let you do it again.

Mr. Tonkoff: I will reframe that and ask this question.

Q. What caused you or what made you come to the conclusion to move from here to the State of Washington?

Mr. Clements: We object to that as calling for a conclusion of the witness, and calls for a self-serving declaration; he may state the facts.

Mr. Tonkoff: The purpose of this, I wonder if the Court wants to hear from me.

The Court: I will hear what you have to say, Mr. Tonkoff.

Mr. Tonkoff: The purpose of this is, the Court will recall that Mr. Clements asked if he heard reports or complaints concerning the action in dismissing the case, that is, if he heard those reports and complaints up to [98] May 13, I believe that was the question. I am inquiring now as to the cause of his leaving——

The Court: ——Of course, the reason I feel that it is not admissible is that the first publication was in January of that year, and this publication wasn't brought up until May 13. He has already testified that he read the article in the *Spokesman Review* in January, and testified that long prior to this publication the same criticism was being made of him orally, so I don't think that I should admit this question because you can hardly pin it on these newspapers and this publication because it was

(Testimony of John K. Borg.)

going on since January, long prior to this publication.

Mr. Tonkoff: That is true, Your Honor, but I offered the articles yesterday, and Your Honor held that they were not libelous and this article is in itself libelous.

The Court: You didn't offer the *Spokesman Review* article in evidence, as I remember it, and that was a matter of public distribution here in the community. I will have to sustain the objection, there is no use of us arguing about it.

Mr. Tonkoff: No, that is right, and I did not intend to argue with the Court. I will take an exception to the ruling of the Court—— [99]

The Court: ——You understand very well that you have an exception to every ruling this Court makes and you don't need to imply to this jury that you need to except to any rulings because you know that you don't have to except here. If this Court makes any mistake at all during the trial of this case, of course, it is ground for appeal.

Mr. Tonkoff: I apologize, Your Honor, sincerely, I didn't mean it that way.

The Court: Yes, I know—you are a very good lawyer, Mr. Tonkoff, and you don't need to take any exception here.

Mr. Tonkoff: That is all, Judge Borg.

(Testimony of John K. Borg.)

Recross-Examination

By Mr. Clements:

Q. Did I understand you to say, Mr. Borg, in your last examination by Mr. Tonkoff, that you had never held a preliminary examination in the Police Court?

A. It is a little hard to determine because it is quite different as to what constitutes a preliminary hearing. I suppose any case where the defendant pleads not guilty it would perhaps be a preliminary hearing, and if that is the case I have certainly had some of those in the courthouse and at the Police Station. [100]

Q. Mr. Borg, you presided over a preliminary hearing on the 21st of January, 1953, when Mr. Murray Estes was again before you on a charge of assault with a deadly weapon, didn't you?

A. Yes, sir.

Q. And that hearing was started and all of your subpoenas were issued for all of the witnesses to appear at the Police Station, is that right?

A. I don't think so—for that first hearing on the 15th?

Q. No, the second hearing on the 21st?

A. Yes, sir.

Q. And you began that preliminary hearing there and on account of so many people being present you moved it to the district court, didn't you?

A. Yes, sir.

Mr. Clements: That's all.

(Testimony of John K. Borg.)

Mr. Tonkoff: That's all, Judge Borg.

The Court: You may step down.

Mr. Tonkoff: I will call Laurence Huff.

LAURENCE HUFF

called as a witness by the plaintiff, after first being duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is Laurence Huff? [101]

A. Yes, sir, Laurence E. Huff.

Q. What is your profession?

A. I am an attorney-at-law.

Q. Where have you practiced?

A. Moscow, Idaho.

Q. And when were you first admitted?

A. June of 1922.

Q. And where have you been practicing all of those years, Mr. Huff? A. Here at Moscow.

Q. And are you familiar with the procedures in Moscow and with the various places where hearings are held?

A. I am familiar with the proceedings in the State of Idaho.

Q. And with the practice in this county?

A. Yes.

Q. Where have preliminary hearings heretofore been held?

A. In my experience they have been held in the district courtrooms of the County District Court.

(Testimony of Laurence Huff.)

Q. And that is how far from the Police Station?

A. Well, if you go straight up the hill it would be four blocks, but the way you have to go it is about six blocks.

Q. They are two separate buildings, are they?

A. Yes, two separate buildings.

Q. Mr. Huff, did you have a conversation with Mr. Alsager concerning whether he would appear at a hearing which was [102] brought before Judge Martinson and later transferred to Judge Borg?

Mr. Greene: Now, I object to that as calling for hearsay and made out of the presence of these defendants.

The Court: Yes, this testimony might be admissible if Mr. Alsager takes the stand but it is not admissible at this time.

Q. Did you have anything to do with the preparation of the dismissal of the case of the State of Idaho against Estes that was to be held on the 15th of January, before Judge Martinson?

A. I did.

Q. Would you state under what circumstances that dismissal was prepared?

Mr. Greene: Again I object, your Honor, it is calling for hearsay and made outside of the presence of the defendants.

The Court: The record has been introduced here in evidence and I think the record is the best evidence.

Mr. Tonkoff: Your Honor, there is another part of that record that is not in the record.

(Testimony of Laurence Huff.)

Mr. Clements: I think, if I may be permitted to interrupt here, that this is a subject [103] that should not be gone into in the presence of the jury.

Mr. Tonkoff: I think counsel is right, your Honor.

Q. Mr. Huff, have you ever attended a preliminary hearing such as the one we have been discussing here in connection with the case against Mr. Estes, at the Police Station?

Mr. Greene: Now, I object to that as being immaterial, your Honor.

The Court: The objection is sustained.

Q. You are familiar with preliminary hearings, are you not, as a practicing attorney?

A. Yes, sir.

Q. And would you state what the procedure is when a complaining witness does not appear at a preliminary hearing?

Mr. Greene: We object to that, your Honor, as calling for a conclusion of a witness on a matter of law and it invades the province of the Court and jury.

The Court: The objection will be sustained.

Q. Mr. Huff, does the prosecutor appear at all preliminary hearings?

Mr. Greene: We object to that, if the Court please, as being immaterial and not tending to prove or disprove any issue in this case.

The Court: He didn't appear at this [104] one.

Mr. Tonkoff: I am trying to find out what the

(Testimony of Laurence Huff.)

procedure is and I think he is an expert and should be allowed to answer the question, I don't know what your Honor's ruling is on the matter. That is the purpose of the question, to find out what the practice is, I think it is quite important.

The Court: I can tell you what the practice is, the prosecuting attorney has to be at a preliminary hearing if one is held or have his assistant there. He don't need to testify to that.

Mr. Tonkoff: I would like to cite you the statute on that.

The Court: I will let him answer, I know what it is.

Q. Is there a statute in that respect concerning the appearance of the prosecuting attorney at a preliminary hearing?

A. I find myself in a very embarrassing position and I am very reluctant to answer in view of the statement of his Honor.

The Court: I am supposed to know the law and I will instruct this jury as to what the law is, but I will let you testify this one time as to what the law is, Mr. Huff, however, it is the province of the Court to instruct the jury as to what the law [105] is.

A. Without the statute before me I would be reluctant to testify positively but it is my understanding that the prosecutor did not appear unless called in by the Justice of the Peace.

Q. Unless he is called in?

(Testimony of Laurence Huff.)

A. Unless he is called in by the Justice of the Peace.

Q. Do you remember the section of that statute, Mr. Huff?

A. I don't remember the section just now.

Q. About what is the size of the police courtroom at the Police Station?

A. I should say about twice the size of the dais upon which the jury is sitting.

Q. What furniture was in it at that time?

A. There was two tables and three or four chairs.

Mr. Tonkoff: I will dispense with any further examination and I may call you back, Mr. Huff. Your witness.

Cross-Examination

By Mr. Greene:

Q. Mr. Huff, you were Mr. Estes' attorney in defending the charges brought against him by Mr. Shoup?

A. I will have to qualify that to a certain extent, Mr. Greene, my first appearance and I don't want to use the word appearance in the legal sense. My first activity would [106] be more in my situation as being the oldest member of the bar of Latah County in a point of both age and years of service.

Mr. Greene: I am going to ask that answer be stricken as not being responsive to the question.

The Court: It may be stricken.

Q. I wonder now if you will answer my question. Did you or did you not defend Mr. Estes on

(Testimony of Laurence Huff.)

at least one of the cases brought against him by Mr. Shoup?

A. I later appeared as his attorney officially of record.

Mr. Greene: That is all.

Redirect Examination

By Mr. Tonkoff:

Q. Were you with Mr. Estes on the morning of the 15th, Mr. Huff?

A. Will you please state what time in the morning?

Q. At eight o'clock, from eight o'clock on or prior to eight o'clock, a.m.?

A. From eight o'clock on or maybe a fraction before that I was in the office of Estes and Felton continuously until sometime about a quarter to nine except for a matter of four or five minutes, whatever time it would take to walk across the street and walk upstairs to Mr. Alsager's office and back down. I was at the office of Estes and [107] Felton during that time.

Q. And during the time that you were in that office did you see Judge Borg?

A. No, he was not there.

Q. In the office or about the premises?

A. I didn't see him at any time during that time or while I was outside.

Q. Did you accompany Mr. Estes and Mr. Felton to the Courthouse?

A. No, I did not.

(Testimony of Laurence Huff.)

Mr. Tonkoff: That is all for the present, Mr. Huff, as I said before, I may call you back.

Mr. Greene: I have nothing further.

Mr. Clements: I have no questions.

The Court: You may step down.

Mr. Tonkoff: I will call Mr. O'Donnell.

J. M. O'DONNELL

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is James O'Donnell?

A. J. M. O'Donnell. [108]

Q. And what is your profession, Mr. O'Donnell?

A. Attorney-at-law.

Q. How long have you practiced?

A. Since 1938; I was admitted in 1936.

Q. Where have you been practicing during that time?

Q. In the general practice at Moscow, Idaho.

Q. Have you held any public office?

A. Yes; prosecuting attorney of this county.

Q. When were you the prosecuting attorney?

A. From the first week in 1943 until the first week in January in 1953.

Q. And that was for Latah County?

A. Yes, sir.

Q. During the time you were prosecuting attorney you held preliminary hearings—you are

(Testimony of J. M. O'Donnell.)

familiar with this preliminary hearing that we have been discussing here, are you? A. Yes, I am.

Q. And had you held that type of hearing in the ten years that you were prosecuting attorney?

A. Yes, sir.

Q. How many would you say?

A. About five or six a year.

Q. And where were they held?

A. Nearly all in the Courthouse of Latah County, Idaho, here [109] in Moscow.

Q. You say nearly all; were some held elsewhere?

A. During the ten years' time I wouldn't be able to say absolutely that there were none held any other place—I do know of one instance where the hearing was held at another place.

Q. And where was that?

A. At the Moscow, Idaho, Police Station, in Moscow.

Q. Were there any special arrangement or reason for holding it there?

A. That particular case was held before a man by the name of Kent Power who was a law student at the University of Idaho who was a Justice of the Peace in Latah County, Idaho, and qualified to hear State cases and was also appointed and retained by the City of Moscow to act as Police Judge and hear city cases. He held court at a certain hour every day for the city and we knew that it was convenient to catch him there for Justice of the Peace work.

(Testimony of J. M. O'Donnell.)

The particular case that was held there that I recall was a case in which the defense attorney stated that he didn't want a transcript and the only witness that I intended to introduce in the State's case was a police officer whom I also knew would be at the Police Station. [110]

Q. Was there any defense attorney in that case?

A. Yes, there was.

Q. What is the size of that Police Courtroom where you held that hearing, that meeting at the Police Court or Police Station?

A. It's very small; it would not be any larger and possibly not as large as that described by Mr. Huff. It is not very large, but I guess maybe it would be twice as large as the dais upon which the jury is sitting.

Q. Is there any furniture in it?

A. Yes; there was a desk right behind which there was a chair for the Justice of the Peace and there was another desk on the opposite side of the room where there was a chair for a police officer and probably four other chairs.

Q. Is there ample room for a reporter to attend there, particularly if there are several witnesses?

A. Oh, there is room for a reporter to sit and write.

Q. And you say that in all of your ten years of experience that is the only time you know of where a case was held outside of the courtroom?

A. That is the only one that I can particularly recall.

(Testimony of J. M. O'Donnell.)

Mr. Tonkoff: That is all; your witness. [111]

Cross-Examination

By Mr. Greene:

Q. Who was the defense attorney in the particular case where the hearing was held at the Police Station? A. Melvin Alsager.

Q. That is the now Prosecuting Attorney of Latah County? A. Yes, sir.

Q. When did you say that you first became Prosecuting Attorney?

A. The first week in January of 1943.

Q. Can you give us any idea as to how many preliminary hearings were held that year that you attended? A. No, I couldn't.

Q. Can you give us any idea as to whether any of those were held at the Police Station?

A. No, I could not, positively.

Q. And if I asked you the same question for each of these succeeding years, would your answer be the same? A. Yes, it would have to be.

Q. Have you ever made any effort to determine from the records how many preliminary hearings were held at the Police Station and how many were held at the district courtroom?

A. No, sir, I haven't.

Q. Do you recall holding a preliminary hearing in your own office, Mr. O'Donnell?

A. I don't recall but I would not deny that it had been done [112] in the ten years time.

(Testimony of J. M. O'Donnell.)

Mr. Greene: That's all.

Mr. Tonkoff: That's all, Mr. O'Donnell.

The Court: We will recess at this time until 2:00 o'clock this afternoon.

April 6, 1954, 2:00 P.M.

R. J. TUNNICLIFF

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is R. J. Tunncliff?

A. Yes, sir.

Q. And you are hear under subpoena?

A. Yes, sir; in fact, three of them.

Q. What is your occupation or profession?

A. I am the official court reporter for the second judicial district.

Q. And that is for Moscow and the surrounding Country? A. Yes, sir.

Q. And have you been reporting here in the City of Moscow for some time?

A. Yes; that is outside of my job, however. [113]

Q. Your official job is what?

A. Official reporter for the second district and that is Latah and Clearwater Counties.

Q. Where is your office?

A. In the Courthouse in Moscow, Idaho.

Q. How long have you been working in that posi-

(Testimony of R. J. Tunnicliff.)

tion? A. Since September of 1942.

Q. During that time have you had occasion to report any preliminary hearings? A. I have.

Q. Has anyone else reported them besides yourself, that you know of?

A. Not to my knowledge.

Q. During that time where have the preliminary hearings taken place?

A. Up until February 11, 1954, in the district courtroom in the Courthouse in Moscow.

Q. Those are preliminary hearings for Latah County? A. Latah County, yes, sir.

Q. And have you reported any preliminary hearings any place other than at the courtroom?

A. No.

Mr. Tonkoff: That is all; your witness. [114]

Cross-Examination

By Mr. Greene:

Q. Mr. Tunnicliff, your using the courtroom in the Courthouse here in Moscow was a matter of convenience for you with your office there in the Courthouse? A. Not as I understood it.

Q. Do you know of any particular reason why they were held at the courtroom?

A. Yes, sir; two reasons.

Q. What were they?

A. One is that the City Hall or Police Station is only used by the Police Judge in that capacity rather than as Justice of the Peace, in other words.

(Testimony of R. J. Tunnicliff.)

the Justices of the Peace of the County do not use the City Hall, only the Police Judge. The other reason is that it is very inconvenient in that small room to hold a hearing, in fact, it is impossible to hold a hearing.

Q. I think the second judicial district takes in Clearwater County? A. Yes, sir.

Q. Do you attend the sessions of the district court in Clearwater County? A. Yes, I do.

Q. And who takes the preliminary hearings, if any come up, when you are away? [115]

A. That I don't know, if any come up.

Q. On January 15, 1953, where were you?

A. I think I was out of town. I think in Orofino.

Q. Do you know how long you had been there that time?

A. That sounds like the regular motion day, the first and third Friday of the month.

Q. Then you were not available in Moscow for the purpose of reporting a preliminary hearing on that day? A. I was not.

Q. Do you recall on Monday following the 15th of January, 1953, where you reported a preliminary hearing that started initially at the Police Station and then was moved to the Courthouse?

A. I reported that preliminary hearing but I have no knowledge of being at the Police Station that day.

Q. Then you don't know where that particular case was actually set to be heard originally that day?

A. No, I don't.

(Testimony of R. J. Tunnicliff.)

Q. That was the case of the State of Idaho vs. Murray Estes? A. That is correct.

Mr. Greene: That's all. [116]

Redirect Examination

By Mr. Tonkoff:

Q. While you were at Orofino where did you stay? A. At the Helgeson Hotel.

Q. At that time had you read this article of May 13? A. Yes, I had.

Q. Pardon me, I am confused on that—were you at Orofino about the 15th of May, 1953?

A. The 14th and the 15th.

Q. And where did you stay there?

A. The Helgeson Hotel.

Q. At that time did you hear any discussion concerning the article of May 13, 1953? A. I did.

Mr. Tonkoff: Now, your Honor, in view of the Court's ruling I don't want to ask any further questions on this. That is all.

Mr. Greene: No further questions.

Mr. Tonkoff: At this time, your Honor, we have a deposition to offer.

The Court: Do you want to read it at this time?

Mr. Tonkoff: Yes.

The Court: It may be more convenient for one of you to take the witness stand. Ladies and [117] gentlemen of the jury, you will consider this deposition that is about to be read the same as if the person making the deposition was on the witness

stand testifying. One of the attorneys will act as witness, the other attorney will ask the questions and you will interpret the deposition the same as if the witness was here testifying before you, in person.

The Court: Mr. Clerk, you may show the deposition as published.

The Court: You don't need to read any of the preamble, just give the name of the witness and go right ahead with the questions and answers.

Mr. Clements: I want to make an objection to this deposition and I am conscious that this might be premature. Whether I make it now or at the conclusion of the reading of this deposition, I make it upon the grounds that this deposition and the material contained therein is not binding upon the Tribune Publishing Company for the reason that no reference is made to the Tribune Publishing Company nor is the article of May 13 published by the Tribune Publishing Company identified or mentioned in this deposition.

The Court: If that is true, your objection is well taken. You may proceed.

Mr. Tonkoff: This is the deposition of [118] A. L. Morgan, taken on the third day of April, 1954.

DEPOSITION OF A. L. MORGAN

Q. Your name is A. L. Morgan?

A. Yes, sir.

Q. And where is your residence?

A. Moscow, Idaho.

Q. How long have you lived in Moscow, Mr. Morgan?

A. Since 1897, that's been my residence. Of course, I have had temporary times away to other states but my residence, both as a place to live and my citizenship, has been in Idaho.

Q. How long have you been admitted to the bar in Idaho? A. Since 1898.

Q. During most of that period have you practiced law in Moscow or been associated in the field of law in Moscow? A. Yes.

Q. What official position have you held, if any?

A. Well, I was District Judge here for 12 years.

Q. Between what years?

A. Let me see, I served out four terms. That would be—I was elected in 1938, my term of office would start then in 1939 and——

Q. You left office in 1950?

A. Yes, at the close of 1950. I am sure it was 12 years that I served in office there.

Q. During the period that you were District Judge were your [119] chambers immediately adjacent to the district courtroom in the Courthouse of Latah County? A. Yes.

Mr. Estes: I will not read the next question as it was not answered.

(Deposition of A. L. Morgan.)

Q. As District Judge did you have charge of the district courtroom of Latah County?

A. Yes, sir.

Q. Who was it that gave permission for the use of that courtroom for purposes other than district court trials?

A. Myself, if I was in town. The janitor was permitted to permit any meetings that he desired to if I was away from town.

Q. What is your recollection with regard to any request for the use of that courtroom for any preliminary hearings?

A. Well, I think that as far as I can remember, every felony that got into court while I was in office, the preliminary was held in the courtroom in the Courthouse.

Q. In the period of time that you have practiced law in Moscow and the period of time you were District Judge has there ever, within your knowledge, been a preliminary hearing held at the Polic Station in Moscow?

A. Not that I know of.

Q. Did you engage, prior to the time that you were District Judge, in the defense of criminal cases? [120]

A. Yes, sir.

Q. During the winter of 1952 and 1953 where were you living?

A. Well, '52 and '3, that would be this last winter and the winter before. Of course, I have been here in the hospital since, I think that it is the latter part of April of last year.

Q. That would be 1953?

(Deposition of A. L. Morgan.)

A. Yes, and during the wintertime I was at my stepson's place in Coeur d'Alene most of the time.

Q. Do you recall during the winter you were in Coeur d'Alene of reading any newspaper accounts regarding a criminal proceeding against Murray Estes?

A. I am not sure that I recall whether I read it all or not, but I know that I read about it and talked to people about it. I was able to get around then. Maybe I read it in the Review, I don't know.

Q. Was that while you were in Coeur d'Alene?

A. Yes.

Q. You say that you entered the hospital here in Moscow in April, 1953?

A. That is the best of my recollection. I intended to find out about it but I am quite sure. The records at the Courthouse would show it—that's the records I make. I think it was the latter part of April in 1953.

Q. And have you been here in the hospital [121] since?

A. All of the time, I haven't been out.

Q. Handing you a publication of the Daily Idahonian bearing the date of Wednesday, May 13, 1953, which has been marked Plaintiff's deposition Exhibit 1, did you have occasion to read an article in that paper which is headlined, "Good Government Association Formed at Public Meeting Called at School"? A. Yes, I did.

Q. When did you read that first, Mr. Morgan?

A. As near as I can recall, I read that the day

(Deposition of A. L. Morgan.)

it was published. Now, once in a while we had a little trouble about the boy getting around, but I read it right around that time, while I was here in the hospital.

Q. After that publication did you have any occasion to hear discussions concerning that publication? A. Yes, I heard it talked about.

Q. Will you state in your own words the gist of the discussion which you heard?

Mr. Tonkoff: There is an objection there. Do you want to read it, Mr. Greene?

Mr. Greene: No, let it pass.

A. Well, I have heard talk about it by various people since the article appeared. Now, frankly, I couldn't give you the names of all of them. Naturally, I have talked about [122] it. I have talked to Mr. Tunnicliff about it, and I talked to Dr. Loehr, and I have also talked to a number of patients here that were recuperating and walking around and they would drop in here and during the course of conversation that often would come up. I simply couldn't give the names of those people. In fact, some of them I didn't even know.

Q. When were these discussions held, over what period of time, or about what time, as nearly as you can recall?

A. The last one, I guess, was this morning and that was merely a discussion between myself and the doctor as to——

Mr. Greene: Again, before the witness answers, I would like to make the same objection, that this

(Deposition of A. L. Morgan.)

is hearsay and made outside of the presence of any of the defendants and would be immaterial. That question was not answered, your Honor.

The Court: Very well, you may continue with the questions and answers.

Q. Will you state, Mr. Morgan, what the conversation consisted of?

Mr. Greene: Again the same objection. It calls for hearsay and is outside of the presence of any of the defendants and is immaterial, and I would like to add to the objection that it is shown that the conversation was had subsequent, to the filing of this action [123] and therefore it would be immaterial.

The Court: The objection will be sustained. The Court has ruled on that matter heretofore. I don't like to sustain any objection to any statement that Judge Morgan may have made; he is a fine man and a fine judge; nevertheless, I will have to sustain the objection.

Mr. Tonkoff: Now, the next question is in relation to this same matter.

Mr. Estes: And that same matter continues on through to the top of Page 11 of the deposition and I presume there would be the same objection.

Mr. Greene: Yes, that is right.

The Court: And the same ruling.

Mr. Tonkoff: I wonder, your Honor, if the court reporter could write these questions in the record as an offer of proof?

The Court: Yes, the court reporter is authorized

(Deposition of A. L. Morgan.)

to write into the record the questions and they will be considered as an offer of proof by you and the reporter may also show in the record that the offer was denied by the Court.

(Whereupon the following questions were referred to and are at this time copied into the record.)

Q. Was anything said in these discussions concerning John Borg? [124]

The Court: Mr. Tonkoff, would you hand me that deposition so that I might look those over, there may be something that I would want to permit you to ask here.

Mr. Tonkoff: Certainly, it is from Page 8 to Page 10.

(Whereupon, the Court read Pages 8 to 10 of the deposition.)

The Court: I don't see why this would mean anything one way or another. I will let you read it, you may go ahead with the questions I have examined from Pages 8 to 10, inclusive. You may go ahead with all of the testimony there in the deposition.

Mr. Greene: I don't believe that you had finished Page 7.

The Court: I think that is right, you may go ahead with all of the testimony, that would be beginning at Line 17 of Page 7.

Q. Was anything said in these discussions concerning John Borg?

(Deposition of A. L. Morgan.)

A. I don't know whether I exactly understand that question or not, Mr. Estes. I can say this truthfully that his name was mentioned and the fact that he was a Justice of the Peace, but I don't recall anything being said as to [125] his reliability and honesty or anything of that kind, I don't believe it was discussed at all.

Q. Was anything said in these conversations regarding John Borg in connection with the dismissal of the two charges which had been filed against Murray Estes in his Court?

A. What was the question?

(Previous question read to the witness.)

A. Well, again I am not sure that I understand that question. Even this afternoon I was talking to one of the nurses here and she said, "How is it the lawyers all got off. There must be something crooked or wrong about it."

Q. That's what I mean by the question, Judge Morgan, was there any discussion in those conversations as to there being anything crooked in the dismissal of the charges?

A. I think that in a number of cases—I realize that this is rather weak testimony because I cannot point out to you the particular people that I talked to. As I said awhile ago, I talked to a great many about this case that I didn't even know, here in the hospital.

Q. Did you have anything else to add there?

A. No.

(Deposition of A. L. Morgan.)

Q. You referred to one of the nurses remarking that there must have been something crooked in connection with all lawyers getting off. Were similar remarks made in the discussion by other [126] persons?

A. With reference to other people, a number of them did inquire as to just why a lawyer could get away with a matter of that kind or a judge would dismiss a case under the circumstances outlined in that article.

Q. Do you remember any particular conversation with any person concerning Judge Borg's dishonesty in connection with the cases referred to in that article?

A. Well, I don't recall any particular conversation of that kind.

Q. During any of these conversations was there any question raised of John Borg's honesty or good faith in connection with the dismissal of the actions referred to in the article?

A. Could I have that question?

(Question repeated.)

A. Yes, I think there was. I am quite sure that at that time a number of people have questioned me about that. In other words, more as a matter of curiosity to find out—they maybe thought that having been a judge once I knew how easy it was to get took for a ride. I don't know but they did come in here and ask as to just what Borg, Judge Borg, had in mind in taking the action that he did.

(Deposition of A. L. Morgan.)

Q. You say that you have been practicing here and been judge for a period of years since 1898?

A. I was admitted to the bar at the October term at Lewiston [127] in 1898.

Q. The same system of criminal jurisprudence is in effect that has been in effect all of those years, has it not?

A. Well, for a majority of the time. If you will remember, I could be mistaken about this, there was some change of jurisdiction and some different arrangement about justices of the peace some years after I commenced to practice law, and I think I participated in one or two as a practitioner.

Q. You are familiar with the procedure of getting felony cases into District Court?

A. Oh, yes.

Q. Is it proper practice, in your opinion, for a Justice of the Peace to dismiss an action pending in his court when the State fails to appear at the time fixed for preliminary hearing?

Mr. Greene: I am going to object to that, your Honor, on the ground that it calls for a conclusion of the witness and invades the province of the Court and jury in this proceeding.

The Court: The objection will be sustained. I want you gentlemen to understand that I have admitted all of this testimony over your objection.

Q. Upon motion of the defense for dismissal when the State has failed to appear at the time fixed for preliminary hearing, in your opinion there

(Deposition of A. L. Morgan.)

would be nothing for the [128] Justice of the Peace to do but dismiss the action?

Mr. Greene: Again I object to that as being immaterial, calling for a conclusion of the witness and invades the province of the Court and jury.

The Court: Yes, I will instruct the jury on that matter later.

Mr. Tonkoff: Then that is all; you may cross-examine.

Mr. Greene: I have no cross-examination at this time.

Mr. Tonkoff: Then I will offer this exhibit in evidence, the newspaper, as Plaintiff's Exhibit No. 9.

Mr. Greene: We have no objection.

Mr. Clements: No objection.

The Court: The newspaper may be admitted as Exhibit No. 9.

LOUIS A. BOAS

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Boas, on the 13th of January, 1953, did your paper publish the following—— [129]

Mr. Greene: Now, I object to that on the ground that the document would be the best evidence.

The Court: Yes, I think it would be; you may show it to the witness.

Mr. Tonkoff: Perhaps it should be marked first.

The Court: Yes, you may have it marked.

(Testimony of Louis A. Boas.)

Mr. Clements: May we see that before it is handed to the witness?

The Court: Yes, you may. Mr. Bailiff, you may hand it to counsel.

The Court: Have you examined the article, Mr. Clements?

Mr. Clements: Yes, I have.

The Court: Mr. Bailiff, hand it to the witness.

Q. Will you examine Exhibit No. 10 and say whether or not that article appeared in the Daily Idahonian? A. I believe it did.

Q. Calling your attention to Paragraph No. 3, particularly——

Mr. Clements: Now, I object to his testifying from an exhibit prior to its being admitted in evidence.

Mr. Tonkoff: I think that is correct [130] and I will offer it in evidence at this time.

Mr. Greene: Now, your Honor, I object to it on the ground that the document shows on its face that it was published at a time when the proceeding in question was pending before Judge Martinson and prior to his disqualification and the transfer of this case to Judge Borg and, therefore, it is wholly immaterial in this case.

Mr. Tonkoff: The purpose, I believe, your Honor, is apparent in Paragraph 3.

The Court: This, I take it, is just something that does not concern the plaintiff at all but I will admit it. It is a publication of a matter of news. I don't think there is anything in it that will assist the jury

(Testimony of Louis A. Boas.)

or anyone else in determining any of the issues in this case. If you feel it is material, I will admit it and you may read it to the jury, that is, if you desire to offer it.

Mr. Tonkoff: Yes, I did offer it.

The Court: That is right, and it was admitted.

Mr. Tonkoff: I am not concerned in the entire article.

The Court: You will read the entire article, and not any one part of it. [131]

Mr. Tonkoff: Very well: "A criminal complaint was filed in Probate Court yesterday afternoon by a McKeesport, Pennsylvania, sophomore at the University of Idaho, charging a Moscow attorney with a felony as the result of an alleged altercation occurring on the University campus last December 14. The youth, Richard L. Shoup, charges Murray Estes with assault with a deadly weapon, a felony under the laws of Idaho.

"Estes voluntarily appeared and submitted himself to the jurisdiction of the Court, Probate Judge Lloyd Martinson said today. Preliminary hearing has been set for 9:00 a.m. Thursday at the Probate Judge's office. The complaint filed personally yesterday by Shoup charges that Estes came into a place of business near the University of Idaho campus, commonly called the Perch. About 30 college students were within the place, the complaint recites, and says he, Shoup, came into said place while defendant was there. That the defendant did violently assault Shoup and did exhibit a gun and

(Testimony of Louis A. Boas.)

did point the gun at Mr. Green, owner of the Perch, and did make repeated threats to use the gun for the purpose of killing the complainant.

“Shoup asked that a warrant be issued for Estes’ arrest. When informed of the charge, Estes voluntarily appeared and asked for preliminary hearing. Estes, well [132] known Moscow attorney, has practiced in Moscow for approximately 20 years and is presently in law partnership with Tom Felton. He served three terms as county prosecutor from January, 1935, to January, 1941. The complaint did not give any details of the alleged incident. Estes was not available for comment this afternoon.”

Q. Mr. Boas, one more question, as of May 13—up to May 13, from the time of this incident occurred on December 14, referred to in Exhibit No. 10, you had reports concerning the progress of the matter? A. What do you mean by reports?

Q. Well, by your reporters?

A. The reporters wrote news stories when anything of news value occurred.

Q. And did you pass upon any of those stories?

A. Yes, sir; most of them.

Q. Were you during the Christmas holidays in Los Angeles?

A. Yes—just a moment, what Christmas holidays?

Q. 1952-53, these last ones? A. Yes, I was.

Q. And did you at that time have occasion to meet with and to talk with Mr. Bob Hooper?

(Testimony of Louis A. Boas.)

A. Yes.

Q. Did you at that time make any statement concerning any [133] publication that you were going to make in this case?

A. No, sir, I didn't.

Q. You never made any statement?

A. No, sir.

Q. As of May the 13th, from the reports that you received from your reporters, did you ever discover anything dishonest concerning Judge Borg, concerning his handling of the Estes matter?

Mr. Greene: That is objected to as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Greene: And also it calls for a conclusion.

The Court: Yes, it would be purely an opinion of this witness.

Mr. Tonkoff: It is for the purpose of showing malice, I simply want to state my reason for asking.

The Court: The objection is sustained.

Mr. Tonkoff: That is all, Mr. Boas.

Mr. Greene: I have no questions.

Mr. Clements: I have no questions.

Mr. Tonkoff: I would like to recall Mr. Johnston for a question or two. [134]

WILLIAM F. JOHNSTON

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Johnston, what is the size of the Tribune?

A. The current circulation is about 15,000.

Q. Perhaps you told me that yesterday; it is about that, you think? A. Yes, about that.

Q. And that would be about how many readers, about 50,000?

A. Perhaps not quite that many.

Q. What would be your estimate?

A. About 45,000.

Q. How many people does the Tribune employ?

A. I don't know.

Q. What was your capacity? I think you said, but I have forgotten.

A. I am managing editor.

Q. As managing editor, you are, I assume, authorized to pass upon some of the articles that are published in the paper?

A. Some of them.

Q. As a matter of fact, Mr. Johnston, on January 14, Wednesday, January 14, at that time did your paper carry a statement or make a statement that Judge Martinson had—— [135]

Mr. Clements: Now, we object to this method of examination. If he is referring to an exhibit, then, of course, the exhibit would be the best evidence and

(Testimony of William F. Johnston.)

we object to this, whatever the evidence is or rather the exhibit, we don't know anything about that.

The Court: Yes, the paper would be the best evidence.

Mr. Tonkoff: If he knows about it, I thought I would be entitled to question this witness.

The Court: If he knows about it—of course, he would be entitled to see the paper.

Mr. Tonkoff: Did your Honor sustain the objection?

The Court: Yes, the objection is sustained. This witness would be entitled to see the paper before he was asked to testify from memory here.

Q. Mr. Johnston, how much trouble would it be for you to supply us with copies of the Tribune commencing with January 14, 15, 16, 17, 18 and 21 and 22, of 1953, would it be very much trouble?

A. If that was the desire of the Court we would do our best to get them.

Q. And March the 13 and 29 and April 10, 14, 16, 18, 22, 23, 26, 28 and May 5, 6 and 7; would it be possible for you to get those for us? [136]

A. We don't know; some of our papers we have as our file copies and some of those for those dates we might have extra copies.

Q. Would you make an effort to have them for us tomorrow?

Mr. Clements: May I make an observation, if the Court please?

The Court: Yes, you may.

Mr. Clements: We don't think that we should

(Testimony of William F. Johnston.)

be put under this obligation. This case has been pending here a long time and has been set for trial for two or three weeks and these papers or documents have not been subpoenaed, some of them are available and some are not and to ask the defendant to do that I think is very unfair at this stage of the proceeding.

The Court: I am inclined to think that if they are like the other articles that have been offered here, they are just news articles and we are not trying this paper for the publication of any article except the one that is before the jury at this time. Did I understand you objected to this?

Mr. Clements: Yes, your Honor, we do object.

The Court: The objection is sustained.

Q. What is the value of the plant at Lewiston?

A. I don't know. [137]

Q. Do you know who could inform us on that score? A. Mr. Alford is the publisher.

Q. And is he here now? A. Yes, sir.

Mr. Tonkoff: That is all.

Mr. Greene: I have one or two questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Greene:

Q. Do you keep track of your circulation by counties?

A. Yes, we have that but I do not have it with me.

Q. I was wondering if you could tell me approxi-

(Testimony of William F. Johnston.)

mately what your circulation was in Latah County in the Spring of 1953?

A. No, I can't answer that.

Q. Could you give us an estimate on that?

A. I would estimate about three or four hundred but it is only a guess.

Mr. Greene: That is all.

Mr. Clements: No questions. [138]

A. L. ALFORD

recalled as a witness for the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Alford, what is the amount of stock issued by the Tribune Publishing Company?

Mr. Clements: What was that question?

Mr. Tonkoff: What is the amount of the stock issued by the Tribune Publishing Company?

Mr. Clements: We object to that as incompetent, irrelevant and immaterial.

The Court: Well, he might like to advertise his paper. He may answer.

Mr. Greene: My objection to the question is that it does not state whether it means issued or authorized.

Mr. Tonkoff: I will make a long story short.

Q. What is the value of the plant, do you know?

A. I don't know.

Q. What capacity do you occupy?

(Testimony of A. L. Alford.)

A. Publisher of the newspaper.

Q. Do you own any stock?

A. Nine shares of stock. [139]

Q. You attend the meetings of the stockholders?

A. Yes, sir.

Q. You are a director? A. Yes.

Q. Do you know how much stock is outstanding, what the company is incorporated for?

A. I believe 150 shares.

Q. And is it all issued? A. Yes.

Q. What is the par value?

A. I cannot say, I don't know.

Q. What is the value set on the stock?

A. I couldn't answer that.

Q. What is a share worth?

A. There is no set value.

Q. And you wouldn't know the value of the plant? A. No, I wouldn't.

Q. And how long have you been with the firm?

A. I told you yesterday, I have been with the paper since 1928.

Q. I had forgotten. I didn't mean to repeat. How often do you attend the stockholders' meetings?

A. Whenever they are held.

Q. How often are they held? Is there any prescribed time, about how many do you have a [140] year?

A. There is a prescribed annual meeting.

Q. Do you have financial statements issued at different times?

(Testimony of A. L. Alford.)

A. Not generally speaking, no.

Q. Did you have one issued here some time back?

A. Issued to whom?

Q. Do you have a compilation of the finances, a financial statement of the company?

A. No; that information is confidential and it is available to the owners of the business only.

Q. Have you seen any of those financial statements? A. Yes, I have.

Q. I am going to ask you again, do you know the value of the business? A. I said no.

Q. I assume that you saw that financial statement prepared for income tax purposes, did you not?

The Court: Now, let's not get into the income tax business in this case.

Mr. Tonkoff: I take it, your Honor, that would show just what——

The Court: Go ahead, go ahead.

Q. In the income tax report there are figures which would indicate the value of the business, are there not?

A. If you were a sufficiently brilliant accountant, I assume [141] that they would.

Q. Would it necessarily take an accountant? Do you mean that as a stockholder you are not interested in discovering what that report is?

A. Yes, I am interested.

Mr. Tonkoff: That's all.

Mr. Clements: No questions.

Mr. Tonkoff: We rest.

The Court: The jury may retire at this time for a few minutes.

The Court: The plaintiff has announced that he rests. Do you have any motions that you desire to make?

Mr. Clements: I beg your pardon, I did not hear counsel state that they rested. In the interest of time counsel have agreed that the motions on behalf of all of the defendants will be made through one counsel if that meets with the Court's approval.

The Court: That will be all right.

MOTION FOR DIRECTED VERDICT

Mr. Greene: Comes now the defendant, Tom C. Thomas, and respectfully moves this Court at this time for a directed verdict in favor of this defendant for the following reasons: That the undisputed evidence offered by the plaintiff fails to prove that this defendant was in any manner or in any fashion responsible by [142] acquiescence, consent, approval or otherwise for the publication of the alleged libelous article appearing in the May 13, 1953, issue of the Daily Idahonian and is, therefore, not guilty of the alleged libel charged by the plaintiff in his complaint.

I might say, your Honor, in support of that motion that paragraph four of the complaint alleges that the defendant, Thomas, on or before the 12th day of May, 1953, became the author of a written article concerning this plaintiff, which article, or quotations therefrom, was printed in the Daily Idahonian on May 13, 1953, with the consent, knowl-

edge and authorization of the defendant, Thomas. There is no proof in this case, your Honor, that Captain Thomas ever had any kind of a written article, and there is no proof that it was ever turned over to the newspapers or that it was published with the consent, knowledge and acquiescence of the defendant, Thomas. I want to say further that so far as the address that Captain Thomas made at the High School of which there is evidence here. It is apparent on its face that he could not be a joint tort-feasor with the defendant newspapers because of a verbal address made at the High School and a written article published in the newspaper. I point out that one address or words spoken by one person and another was spoken by another person and they [143] could not be joint tort-feasors further for the simple reason Thomas' measure of damages to the plaintiff would be based on an audience of some 200 people, where, on the other hand, the measure of damage by the newspaper would be the circulation of the newspaper in Latah County and in Eastern Washington which, I believe, was testified as some 4,500, so it is apparent on its face that based on the publication alone and the circulation that the two defendants could not become joint tort-feasors and not being joint tort-feasors they are not properly joined as defendants in this action.

Further, on behalf of all of the defendants, the plaintiff having rested its case, the defendants in both actions now respectfully renew their motion to dismiss heretofore filed in this action against the plaintiff's complaint, claiming that the com-

plaint failed to state a claim against the defendants upon which relief could be granted, which motions were heretofore overruled by the Court subject to the right of renewal upon the trial of said action—the motion is made upon the following grounds and for the following reasons: One, that the consideration of the entire article and the facts and circumstances in connection with their publication establishes that the alleged libelous language was not libelous per se so that the complaint could not state a [144] cause of action against the defendants in the absence of allegations and proof of special damages.

Two, that upon consideration of the entire article and the facts and circumstances in connection with their publication shows that they were made without express malice, were fair comment upon matters of public concern and were therefore privileged.

Third, that the evidence fails to state the degree of certainty required by law as to the damage, if any, to plaintiff's reputation caused by any one article, both articles or circumstances other than the alleged libelous publication, sufficient to sustain an award of damages by a jury, and would be purely speculative.

The Court: Mr. Bailiff, you will recall the jury, please. I will excuse you, ladies and gentlemen of the jury, until 10:00 o'clock tomorrow morning. There are matters that the Court must decide in the meantime and I will meet you here at 10:00 o'clock tomorrow morning.

(Whereupon, the jury was excused.)

The Court: Now, then, gentlemen, I will hear you on this motion.

Mr. Clements: I wonder, if the Court please, if we might have the regular afternoon recess at this time? [145]

The Court: Yes, I think that would be a good idea. We will take a 15-minute recess.

April 6, 1954, 3:10 P.M.

(Arguments of counsel and remarks of Court on motion to dismiss were made at length, not transcribed.)

April 7, 1954, 10:00 A.M.

The Court: In this case the plaintiff charges that the defendant, Thomas, on or before the 12th day of May, 1953, became the author of a written article concerning this plaintiff, which article, or quotations therefrom, was printed in the Daily Idahonian on May 13, 1953, with the consent, knowledge and authorization of the defendant, Thomas, and circulated throughout the States of Idaho and Washington. By no stretch of the imagination can it be said that Captain Thomas was the author of the written article in any way; he had nothing to do with its publication and therefore it would be impossible to say that the plaintiff in this case had established any proof of this allegation of the complaint. The action, as far as T. C. Thomas is concerned, is dismissed.

I have given a good deal of thought to the [146]

balance of the motion and although the Court feels that the publication was a fair and honest report of what took place at this meeting, nevertheless, there is some question in regard to it. I know that the Court should take a positive stand on this matter but I am going to overrule this motion as to the two newspapers without prejudice and I will still consider the matter further either before or after verdict.

The Court: You may call the jury, Mr. Bailiff.

(The following in the presence of the jury.)

(Opening statement by Mr. Reed Clements.)

The Court: You may call your first witness.

Mr. Clements: Yes; we call Mr. Melvin Alsager.

MELVIN ALSAGER

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. Mr. Alsager, how old are you?

A. I am 36.

Q. What business or profession are you engaged or occupied in? [147]

A. I am a lawyer.

Q. You are licensed to practice law in the State of Idaho?

A. That is correct.

Q. When were you admitted to the bar?

A. I was admitted November 21, 1950.

Q. Do you occupy any official position in Latah County at this time?

(Testimony of Melvin Alsager.)

A. I am the present Prosecuting Attorney of Latah County.

Q. When were you elected Prosecuting Attorney?

A. That would be in November of 1952.

Q. When were you sworn into office?

A. I believe it was on January 12, 1953.

Q. From the time that you were admitted to the bar until you became Prosecuting Attorney, did you have any experience in the practice of criminal law?

A. I had a few cases.

Q. Had you ever had occasion to conduct a preliminary examination on behalf of defendants in criminal cases prior to the time that you became Prosecuting Attorney?

A. I had one, I am sure.

Q. And where was that conducted?

A. I believe that was in the Police Station here in Moscow.

Q. Prior to the time that you became Prosecuting Attorney had you had occasion to transact any professional business [148] before John Borg, Justice of the Peace? A. Yes.

Q. What place was it transacted, whatever business you had before him, where was it transacted?

A. The only place was in the Police Station here at Moscow.

Q. Do you recall the circumstances of a complaint being filed—I will withdraw that question—about what time of the day on January 12 were you sworn in as Prosecutor?

(Testimony of Melvin Alsager.)

A. I think it was around 2:00 o'clock.

Q. And where were those proceedings held?

A. In the district courtroom.

Q. And at any time during the day of January 12 were you informed that any criminal complaint had been filed in any court?

A. Yes. I was sworn in at 2:00 o'clock and then I went to my office and I believe it was within 15, yes, about 15 minutes, it was between 2:15 and 2:30 that I received a telephone call from Judge Martinson to the effect that a criminal complaint had been filed in his court.

Mr. Tonkoff: Now, we object to that as hearsay.

The Court: He has answered and the answer may stand.

Q. Did you later receive a copy of the [149] complaint?

A. Mr. Martinson called me and asked me——

Mr. Tonkoff: Any conversation of this kind is objected to that is not in the presence of the plaintiff. I want to make that objection to all of these conversations with Judge Martinson.

The Court: Well, now, this goes to the honesty of practically all of the officials connected with this matter and I believe I will let the jury have all of the facts. He may answer.

A. When Judge Martinson called me and said that a criminal complaint had been filed against Mr. Estes he inquired what I thought about it and I informed him to have his secretary prepare a copy

(Testimony of Melvin Alsager.)

of the complaint for me and that I would pick it up on my way home that evening.

Q. Did you pick it up on your way home?

A. Well, after that time, shortly thereafter, 15 minutes or so, Mr. Martinson came to my office, that was the same afternoon, and discussed this matter with me.

Q. Did he leave a copy of the complaint with you at that time?

A. I don't believe that he left one at that time. I can't recall, but I don't believe that he left one with me at that time.

Q. Did any other person talk with you about this on that same afternoon on January 12?

A. Yes, Mr. Laurence Huff came to my office that same afternoon. [150]

Q. And was this case discussed by you and Mr. Huff? A. Yes, it was.

Q. Just state what transpired between you and Mr. Huff and how he happened to meet you?

A. Well, he came into my office about—it is hard to get these times straight, but he came in that afternoon about 4:00 o'clock, I don't know for sure just the exact time, and he explained to me that he wanted to help me out and he said that he was the oldest member of the local bar and he said that he thought that he had some things that would help me out in this particular case.

Q. And what else was said?

A. I said, well, you go right ahead and tell me what you want to tell me, and he explained to me

(Testimony of Melvin Alsager.)

that under the circumstances and in view of the fact that this complaint, this criminal complaint, had not been filed through my office in the first instance, that the proper procedure for me to follow was to move the Court to dismiss this particular complaint that was on file in the Court now.

Q. Did he volunteer to do anything else in that respect?

A. Well, we discussed the matter a little bit and he volunteered to have or he said that he would get his secretary to prepare the proper papers to move to dismiss this complaint.

Q. Did he make any representations to you at that time that [151] he was appearing as Mr. Estes' lawyer?

A. I didn't get that impression. He didn't say that in so many words, he just said that he was the oldest member of the bar and that he wanted to assist me in this stage of the case. I don't think that he said at that time that he was representing Mr. Estes, no.

Q. Did he later appear at your office with a prepared motion for dismissal of the action?

A. The next morning, which was Tuesday, he came to my office about 10:00 o'clock with a motion—with papers prepared in his office. A motion to dismiss and, I believe, an order along with it.

Q. What did you do with regard to this suggested motion that he proposed?

A. Well, we discussed it a little bit while I was still in my office and I signed the paper on the

(Testimony of Melvin Alsager.)

motion to dismiss and then we went up to the Probate Judge's office in Mr. Huff's car.

Q. What transpired up there?

A. Well, when we got up there we discussed the matter pro and con for quite some time. Judge Martinson didn't like to be faced with a motion to dismiss and Mr. Huff was trying to show us that it was the proper thing to do in this case. We discussed it pro and con and I believe that [152] was about noon, at least, we all had to leave and I believe it was probably noon, so Judge Martinson asked me whether I was tendering that paper for filing and I said that I was not and I said, do not file this paper, and I said not to do anything more in regard to this motion unless you hear from me again.

Q. Did you leave the motion in Judge Martinson's custody at that time?

A. I don't believe that I took that paper back with me to my office, I don't recall taking it back.

Q. Up to that time had you ever met or talked to a boy by the name of Richard Shoup?

A. No, I had never talked to Richard Shoup at all.

Q. Did you know anything about the circumstances of the complaint that Judge Martinson said had been filed in his Court?

A. No, I didn't know anything about the facts of the case at all.

Q. Do you know where that written motion is now, the instrument that you signed?

(Testimony of Melvin Alsager.)

A. No, I don't know what happened to it after I left the Probate Court, but to the best of my knowledge it was never filed, but what happened to the original of that I don't know.

Q. Were you furnished with a copy of it? Did Mr. Huff provide [153] you with a copy?

A. I think there was an extra copy, yes, I believe that I had a copy of it.

Q. Handing you defendant's Exhibit No. 11, will you examine that and if you are familiar with it explain what it is and how it came into your possession and who it was prepared by, if you know?

A. Well, this appears to be a copy of this motion for dismissal which was prepared in the office of Mr. Huff.

Q. Do you think it is a true copy of the original which you signed and left with Mr. Martinson?

A. I believe it is a true copy, yes.

Mr. Clements: Mr. Bailiff, I will ask you to hand that to counsel, if you will. We offer this exhibit in evidence at this time.

Mr. Tonkoff: We have no objection.

The Court: It may be admitted.

Mr. Clements: May I read it to the jury at this time?

The Court: Yes, you may.

Mr. Clements: This is entitled in the Probate Court of Latah County, State of Idaho. State of Idaho, Plaintiff, vs. Murray Estes, defendant. Motion for Dismissal. Comes now Melvin J. Alsager, the duly elected, qualified and acting Prose-

(Testimony of Melvin Alsager.)

cuting Attorney of Latah County, [154] and shows to the Court:

That the complaint in the above-entitled matter apparently prepared by a private attorney, was filed in the above-entitled Court on January 12, 1953, in less than 10 minutes from the time when the undersigned was sworn into the office of Prosecuting Attorney of Latah County.

It appears from such complaint that the alleged incidents upon which such complaint arose occurred on December 14, 1952, approximately one month prior to the date of filing such complaint. The undersigned was not consulted by the complaining witness or any person on his behalf either before or since such complaint was filed. The matter was investigated by J. M. O'Donnell, the undersigned's predecessor in office, and Mr. O'Donnell was unable to find any evidence whatsoever upon which to base a felony charge, nor did the complaining witness ever request Mr. O'Donnell to file a felony complaint. The undersigned is informed and believes that the complaint was filed herein as a foundation for a civil action.

The undersigned believes that he would be remiss in his duties if he permits the taxpayers of Latah County to become involved in expenses of a felony proceedings when he, as Prosecuting Attorney, has never been consulted by the complaining witness.

Now, therefore, the undersigned, Melvin J. [155] Alsager, Prosecuting Attorney of Latah County, Idaho, moves this Court for the entry of an order

(Testimony of Melvin Alsager.)

of an order herein dismissing the complaint on file herein, Dated this 13th day of January, 1953, and there is a line for signature, under the line is typed, Melvin J. Alsager, Prosecuting Attorney.

Q. At the time that you executed this instrument had you ever discussed this matter with your predecessor in office, Mr. O'Donnell?

A. Well, just passing,—when we moved some of the county supplies from his office to my office, just in passing we discussed it just that way, yes.

Q. You were not acquainted with any of the details or circumstances? A. No, oh, no.

Q. You did know of the nature or the extent of any investigation that might have been made?

A. Oh, no.

Q. Mr. O'Donnell never discussed with you the details of the investigation? A. No.

Q. Did you ever request or did you order Probate Judge Martinson to actually file this thing, this motion?

A. I don't remember. When we closed that hearing up there I know I told him not to file it. I don't believe that I ever ordered him to file it. [156]

Q. And that was on January 13?

A. That was the second day, the day after, that would be Tuesday, yes.

Q. Did you have any discussion or was any arrangement made or discussed between you and Judge Martinson on the 13th, the second day, about where the hearing was to be held?

(Testimony of Melvin Alsager.)

A. No, I don't believe that there was any discussion at all about where the hearing was to be held.

Q. Did you have any discussion on that date as to whether Judge Martinson would preside or whether he was going to disqualify himself?

A. Now, this is Tuesday, the 13th?

Q. Yes, sir.

A. That afternoon, when I went home about five o'clock that afternoon I stopped by the Probate Judge's office and Judge Martinson and I discussed this matter some more at that time. He indicated to me at that time that he was contemplating disqualifying himself in the matter and I tried to urge upon him not to do so and we discussed it for some time, maybe an hour or so. I know that it got to be supper time and he said that later that evening he would give me a ring and give me his decision as to what he was going to do in this particular matter.

Q. Did he telephone you later that day?

A. That is right, after I got home he called me and told me [157] that he had determined that he should disqualify himself in the matter.

Q. Now, what was done in regard to the case on the 14th of January. What contact did you have with it and what did you do as Prosecuting Attorney?

A. On the 14th of January—

Q. —Let me withdraw that last question. To your knowledge was there ever any warrant of arrest issued against Mr. Estes after that complaint

(Testimony of Melvin Alsager.)

had been filed? A. Not to my knowledge.

Q. Now, what did you do on the 14th?

A. On the 14th, just before noon I received a phone call from Mr. Huff inquiring whether I was going to dismiss this complaint. I told Mr. Huff that I would meet with him in his office at one o'clock that same day and I went home for lunch and came back and stopped right outside of his office and I went into his office,—I didn't sit down or anything, I just told him that I was not going to dismiss this case and that I would appear at the hearing the next day or when it was to be heard.

Q. What was the next transaction on that day in regard to this case. What did you do after you saw Mr. Huff, did you see Judge Martinson?

A. Now, this was on Wednesday, is that the day?

Q. This was the 14th? [158]

A. Wednesday, is that correct?

Q. That is correct, Wednesday, the 14th.

A. That afternoon, the first thing that I did after I got back from lunch and got back to my office I called the University and tried to get hold of this boy, Richard Shoup, whom I had not seen up to that time. I don't know where he was or anything but I insisted that he come to my office immediately and he came within a very short time,—within a very short time he was in my office.

Q. What did you do, if anything, in regard to taking a written statement from him as to what transpired in regard to filing this complaint?

(Testimony of Melvin Alsager.)

A. He came in and I talked to him for a few minutes and I had my secretary take down a statement, a statement of this entire incident surrounding the filing of this complaint.

Q. Now, what was the next incident that arose in connection with this case after you finished talking to Mr. Shoup?

A. Well, even during this time I received a phone call, the same day, I believe, from Mr. Martinson that he had transferred this case to Mr. Borg at the Elks.

Q. After you got this information what did you do?

A. Well, we continued to interrogate Mr. Shoup and to get his story and to go over that, to go over the witnesses that he had and so forth. It was about five o'clock and I had [159] not heard from Mr. Borg at all so I had my secretary call and see whether he was still at the Elks and she informed me that he was and then I proceeded to go over, it was around five o'clock, I believe, that I went to the Elks Temple.

Q. What, if anything, did you take with you?

A. I took a volume of the Idaho Code along with me.

Q. Did you have a conversation at the Elks Temple on the afternoon of January 14, with Judge Borg?

A. Yes, I found him in the card room and I asked him to come out in the outer lobby there and——

(Testimony of Melvin Alsager.)

Q. —Before you get into that, let me ask, was this the first criminal proceedings that you had had any experience with as a prosecutor?

A. Yes.

Q. Now, proceed with your discussion with Judge Borg?

A. I asked Mr. Borg if he would come out in the outer portion of the main lobby of the Elks Temple, which he did. I asked him if he was going to ask me to appear at this hearing and he said, "No," he said he wasn't going to and I told him that I was going to appear at the hearing and he said that I shouldn't appear at the hearing, that I would be committing political suicide if I did and that his advice to me was that I should stay away and not appear. [160]

Q. Did he say anything about your predecessor in office, Mr. O'Donnell as to how Mr. O'Donnell used to carry on preliminary hearing?

A. Yes, after this conversation with Mr. Borg, I told him that because of the very nature of this case it might look bad if I didn't show up and he then mentioned to me that Mr. O'Donnell had not made a practice of appearing at preliminary hearings and he could not see why I should be insisting on appearing at this one.

Q. Now, did you have any telephone conversation the following morning with Judge Borg,—withdraw that question, please,—what, if anything did you do after that conversation with Mr. Borg that afternoon, in regard to preparing the case for trial.

(Testimony of Melvin Alsager.)

A. While I was there talking to Mr. Borg I had this volume of the Code with me and I was going to go over some things with him there and he said to me, he told me that there was no use for me to go over any matters with him there, anything from the Code, because this very book that I was trying to quote to him from, he said that it said right in there that he did not have to know any law and he didn't want me to quote anything to him.

Q. Now, after you left Judge Borg, did you do anything toward making any arrangement with regard to your witnesses for the next morning? [161]

A. Yes, but I kind of left it up to this Dick Shoup to get the other witnesses that he had with him, it was more or less left up to him to get them for me.

Q. Did you get any subpoenas issued for the attendance of those witnesses?

A. No, I did not.

Q. Why didn't you?

A. Well, one thing was that it just never occurred to me and the other was that I knew this Shoup boy would be there with his witnesses. They were demanding at that time to be there and I had no reason at all to think that they would not show up.

Q. What arrangement did you make with these boys as to where they were to meet you for this hearing?

A. I believe that I told them to be there, to be at the Police Station at nine o'clock, or before that if they could, that was just about the extent of it.

(Testimony of Melvin Alsager.)

Q. Now, referring back to your conversation with John Borg early in the afternoon, was anything said in that conversation with him as to where this preliminary hearing was to be held?

A. No, there wasn't a thing said about that.

Q. And up to that time all of the business that you had ever transacted with him or before him, as a lawyer, was at his office in the Police Court, at the Moscow City Hall, [162] is that correct?

A. That is correct.

Q. Now, did you have any conversation with Justice Borg on the morning of January 15, which would be the morning of the hearing?

A. Yes, around eight o'clock I called the Borg residence and I believe that Mrs. Borg came to the phone and then later she got her husband and I said, "John, this is Melvin Alsager and I just want to tell you that I am going to be at that hearing at nine o'clock this morning." And he said a word or two which I don't even recollect now as to what it was, but he did say a word or two and that is all there was to it.

Q. Was there anything said in that conversation as to where the preliminary hearing was going to be?

A. Not to my knowledge, there was nothing said about it.

Q. What did you do after that conversation?

A. Well, I had to get a court reporter, it seemed that the court reporter that we have here in town was out of town and the night before I had been working through the University up here to get a

(Testimony of Melvin Alsager.)

competent reporter to take this testimony. It is difficult to get someone that is competent to take it, and I worked through the personnel department up at the University and so I went up to the University shortly after eight o'clock to get a court [163] reporter to take this testimony.

Q. Did you get one?

A. That is right, they supplied me with one but I couldn't get the girl until about 10 minutes to nine o'clock and I picked her up at West Sixth Village.

Q. Why didn't you get her before that?

A. Well, she had a class or her husband had a class or something, anyway she was not available until 10 minutes to nine and I was just waiting around for her, I had to sit around and wait for her.

Q. What time did you and this young lady arrive back at the Police Station?

A. Well, I believe that it was about 10 minutes to nine or anyway a little bit before nine. She was ready and we drove right down to the Police Station and we must have got there two or three minutes before nine. It was a little before nine o'clock.

Q. When you arrived at the Police Station, what employees were there at that time in connection with the running of the Police office?

A. If I recall, Peggy David was the Police matron there on the telephone and there were several city policemen, uniformed policemen there.

Q. Was Mr. Shoup there at that time?

A. Yes, he was there. [164]

Q. And were the other witnesses that you had

(Testimony of Melvin Alsager.)

arranged for there? A. Yes, they were there.

Q. About how many were there, as near as you recall, at that time?

A. You mean the witnesses?

Q. Yes.

A. There was about nine witnesses.

Q. After you returned with your secretary or reporter, what did you do, if anything, in regard to contacting Judge Borg?

A. Well, the minute I came through the Police Station door I took a glance around through the other room and I saw that Mr. Estes was not there and no one else was there and I immediately got this Peggy David on the phone and I told her to——

Q. Before we go into that now, beside the police matron and the policemen and your nine witnesses, were there any other spectators there that morning?

A. Yes, there seemed to be an awful lot of milling around in the place and out on the street in front there, yes, there were quite a few people.

Q. And what did you request Mrs. David to do, if anything, for you?

A. I had Mrs. David try to contact Mr. Borg and I believe [165] that is what she tried to do.

Q. Did you have any telephone conversation with John Borg that morning, January 15, 1953, where you yourself had a telephone conversation with him at the Assessor's Office sometime after nine o'clock?

A. No.

Q. Was the telephone conversation you had with

(Testimony of Melvin Alsager.)

him at home, at eight o'clock that morning, the only conversation you had with him that day?

A. Yes.

Q. When did Mr. Borg finally show up at the Police Station?

A. I don't know, I would say that it might have been 9:15, we stood around there waiting and it could have been 9:15.

Q. Did you have any conversation with him upon his arrival?

A. Yes, when he came through the door I motioned him aside. I was trying to help him get the thing set up and he informed me that the case was dismissed and it was all closed and there was nothing more to it.

Q. Did he make any proposition to you as to whether he could get this thing rectified or not; did he explain to you as to why he dismissed it?

A. Well, he may have said, I don't recall, but he may have said that I and the witnesses didn't show up or something, he might have said that.

Q. Did he offer to give you or afford you the opportunity [166] of another hearing on the matter?

A. No.

Q. He made no suggestion as to any further proceeding in the case?

A. No.

Q. Was that about the substance of what went on between you then?

A. That is about it.

Q. How long did he stay there—did he stay there in the Police Court or did he go on up town?

A. He didn't stay there very long because I was

(Testimony of Melvin Alsager.)

just furious and I told him that as long as I was Prosecuting Attorney I would never have anything more in his Court and I immediately went to the telephone and tried to call the District Judge in Orofino and while I was waiting for that, Mr. Borg left.

Q. Did you have occasion to have any connection with a case filed before Justice Kent Powers at the second justice precinct in Latah County on a complaint filed against Mr. Murray Estes about the following Sunday or on the 17th of January?

A. Yes.

Q. Who swore out that complaint?

A. That was sworn out by myself. [167]

Q. What was Mr. Estes charged with in that complaint?

A. He was charged with assault with a deadly weapon against one L. G. Greene.

Q. Was it E. G. Green?

A. It might have been E. G., it was Mr. Greene.

Q. Did you direct that a warrant of arrest be issued at that proceeding? A. Yes.

Q. And was a preliminary examination date set for that hearing? A. Yes.

Q. And was the matter tried before Justice Kent Powers?

A. No, he was disqualified by an affidavit of prejudice by Mr. Estes.

Q. And who was the case transferred before?

A. It was transferred to Mr. Borg.

Q. And was the preliminary examination held

(Testimony of Melvin Alsager.)

on that matter before Judge Borg? A. Yes.

Q. Were there any subpoenas issued in that case? A. Yes.

Q. Over the signature of Judge Borg?

A. Yes.

Q. Who prepared those subpoenas?

A. They were prepared in my office. [168]

Q. Handing you Defendant's Exhibit No. 12, marked for identification, I will ask you to examine those just briefly to refresh your memory. Are you acquainted with the signature of John Borg?

A. I believe that is his signature.

Q. Are those the subpoenas that you just referred to in your direct testimony?

A. Yes, sir, they are.

Mr. Clements: We offer this exhibit in evidence.

Mr. Tonkoff: I assume they were issued. I see no materiality in them.

The Court: They may be admitted.

Mr. Clements: I will just read one of these, with your Honor's permission.

The Court: Yes, and then give the names in the others.

Mr. Clements: "In the Justice Court of Latah County, State of Idaho. State of Idaho, plaintiff, vs. Murray Estes, defendant. Subpoena. The people of the State of Idaho and Latah County: To Hugh Keith.

"You are hereby commanded to appear at the courtroom of the above-entitled court at the Moscow

(Testimony of Melvin Alsager.)

Police Station on the 21st day of January, 1953, at [169] 10:00 o'clock a.m., then and there to testify what you may know in the above-entitled action now pending before said Court on the part of the plaintiff, the State of Idaho. Attest my hand, affixed this 20th day of January, 1953. John K. Borg, Justice of the Peace. State of Idaho, County of Latah, ss. William W. Logan, Jr., of said county, being duly sworn, says that he served the within subpoena by showing the original to each of the following persons named therein, and delivering a true copy thereof to each of said persons personally on the blank day of January, 1953, at the said County of Latah. Hugh Keith." And that is signed William W. Logan, Jr. "Subscribed and sworn to before me this 21st day of January, 1953, John K. Borg." And a similar subpoena with the names of the following, one for each, Richard Shoup, James Hearn, Charles Murrin, Omar E. Carroll, Moscow Police Officer Jack Shaw, Elna Wilson, Donald Makinson, Bill Lawr, E. G. (Long) Greene.

Q. What arrangement, if any, did you make to have a court reporter take the preliminary examination in the charge that was referred to here, on the 21st of January?

A. I called up Mr. Tunnicliff and informed him that I wanted him to take the preliminary examination in this hearing.

Q. Where was that hearing actually held, where did it start?

A. It started at the Police Station, but due to

(Testimony of Melvin Alsager.)

the many [170] people that were there at that time, by stipulation of counsel, it was moved up to the district courtroom.

Q. When it was held in the courtroom did Mr. Tunncliff officiate as the official court reporter in taking the testimony?

A. Yes, I believe so; yes, he did.

Q. At that time Mr. Estes was represented by an attorney, was he not? A. Yes.

Q. Who was the attorney who appeared for him in that case?

A. I believe it was Laurence Huff.

Q. And was the testimony adduced at that hearing transcribed later and introduced in the form of a written transcript, by Mr. Tunncliff?

A. I believe it was, yes.

Q. About how many witnesses testified in that proceeding?

A. I believe it was at least eight or nine.

Q. And it would be the ones whose names I have read here? A. Yes, those all appeared.

Q. What action did Judge Borg take after he had heard all of the testimony in that case?

Mr. Tonkoff: That is objected to as immaterial and irrelevant.

The Court: He may answer. [171]

A. Judge Borg dismissed the case.

Q. What did he say, if anything, when he dismissed the case, if you recall?

A. I cannot recall just what he said. He dismissed the case and he may have said something

(Testimony of Melvin Alsager.)

else but I just don't recall what he said at that time, but he did dismiss the case.

Mr. Clements: We have another subject to go into and it will be quite long, your Honor.

The Court: We will recess at this time for 15 minutes.

April 7, 1954, 11:10 A.M.

The Court: You may proceed.

Q. Mr. Alsager, referring to the date of April 8, 1953, was there another charge filed against Mr. Estes in any court?

A. There was a battery charge filed in April, whether it was the 8th or not, I can't say, but there was a battery charge filed.

Q. In what court was that filed—would it have been Kent Power's court?

A. I believe that it was—it is hard for me to recollect whether it was in Kent Power's or Judge Martinson's court.

Q. And do you know whether it was transferred from Justice Power's court into another court, that is, the battery [172] case?

A. The battery case came into the Probate Court.

Q. And was finally disposed of in the Probate Court? A. Yes.

Q. And do you have any knowledge of a complaint being filed against Richard Shoup by Murray Estes in Justice Power's Court?

Mr. Tonkoff: Now, we object to that as incompetent, irrelevant and immaterial and it has nothing

(Testimony of Melvin Alsager.)

to do with the issues in this case; this is a charge now against Shoup.

The Court: He may answer.

A. What was that question again?

(Question read by reporter.)

A. There was another complaint filed, one against Mr. Shoup, that was two or three days after this battery complaint had been filed against Mr. Estes.

Q. Was there ever a hearing had on the battery charge, I mean, was there ever a trial?

A. No.

Q. In general will you just describe the course of the procedure that the battery charge took?

Mr. Tonkoff: Now, we object to that as incompetent, irrelevant and immaterial; we are trying the battery case and that has nothing to do with this case [173] here, it has nothing to do with Judge Borg nor was Mr. Estes involved and it was not heard before Judge Borg.

The Court: We are trying here newspapers for the publication of an article and I think that the jury are entitled to all of the facts in connection with it, and I will permit a wide scope, everything that took place as far as these parties are concerned. If you wish to withdraw the question, you may withdraw it.

Mr. Clements: I will withdraw it.

Q. Mr. Alsager, referring to the battery charge,

(Testimony of Melvin Alsager.)

was Mr. Estes represented by independent counsel other than himself in that proceeding?

A. I don't believe so.

Q. Was there a motion made to dismiss that case on the ground of double jeopardy, do you recall? I mention it to refresh your memory?

A. That is correct. After that battery charge was filed, subsequent to that time a motion to dismiss was made and I believe Mr. Huff was the attorney, yes, he was the attorney at that time.

Q. Was there a proceeding in the battery charge—that is, was the matter taken to the Supreme Court for any purpose, while it was pending?

A. The motion to dismiss was overruled by Judge Martinson and [174] on a writ of prohibition it was sent to the Supreme Court of Idaho, yes.

Q. What action did the Supreme Court of the State of Idaho take on it?

Mr. Tonkoff: The decision of the Supreme Court would be the best evidence.

Mr. Clements: I will withdraw that question.

Q. How was that case finally disposed of? Was it tried or was there a plea of guilty entered?

A. A plea of guilty was entered in that battery case.

Q. Were you present at the time the plea of guilty was entered? A. No.

Q. Were you advised of it?

A. Not before the plea was entered, no.

Q. You were not consulted by the attorney for

(Testimony of Melvin Alsager.)

the defendant or the presiding Probate Judge as to when the matter would be disposed of by plea?

A. No.

Q. Had the matter been set for trial, as you recall?

A. Yes, the matter had been set for trial.

Q. And this plea of guilty was entered prior to the date it was set for trial?

A. Yes, sir, that is correct.

Q. When did you discover that the matter had been disposed of by a plea of guilty? [175]

A. That was after the plea was given and Mr. Martinson called me on the phone and informed me that the Estes case was over; that he had appeared and that he had fined him a hundred dollars.

Q. Is the Murray Estes that you refer to in these four proceedings that we mentioned, is he one of counsel for the plaintiff in this trial?

A. Yes.

Q. What disposition, to your knowledge, was made of the charge that was pending against Richard Shoup?

Mr. Tonkoff: That is objected to; there isn't anything—if the plaintiff can recover he must recover on the allegation set forth in the complaint or complaints. There isn't anything in that matter which makes the answer to this question relevant in any manner. He is referring now to the Shoup trial and not the Estes matter.

The Court: It is all contained in this article, he may answer.

(Testimony of Melvin Alsager.)

A. Could I have the question again, please?

(Question read by reporter.)

A. That case was dismissed.

Q. How did—what brought about the dismissal, if the dismissal was on a motion to dismiss, who brought the motion or made the motion? [176]

A. It was on motion for dismissal and I believe that I made the motion. I am not positive on that, but I think I made the motion for dismissal.

Q. Was Mr. Shoup represented in that proceeding by an attorney?

A. He was represented by Mr. Goff.

Q. Mr. Abe Goff of Moscow, Idaho?

A. Yes, sir. Mr. Abe Goff.

Q. At the time that was dismissed had a hearing been set for the matter, had it been set for trial at the Courthouse?

A. Yes, a hearing had been set at the Courthouse.

Q. And was the charge dismissed at the Courthouse? A. Yes.

Q. Were there a great number of people there?

A. Yes, I think there was quite a few. I can't say how many, there were quite a few people there.

Q. Now, was there more or less of a public meeting held among the spectators after the case was dismissed? A. Yes.

Q. What was the topic under discussion at that time, without relating names or anything like that?

(Testimony of Melvin Alsager.)

Mr. Tonkoff: Now, that is objected to on the same ground as made yesterday——

Mr. Clements: I will withdraw the question and get at it another way. [177]

Q. In that group of people, following the dismissal of the Shoup case, was there any discussion in connection with the advisability of calling a grand jury among the citizens? A. Yes.

Q. Do you know of your own knowledge whether any petition petitioning the authorities for calling a grand jury had been filed or offered to be filed in the County Auditor's office?

Mr. Tonkoff: That is objected to as not within the issues of this case, your Honor.

The Court: The way I look at this is, you are suing here for damages and all of this talk, petitions for grand juries, public meetings, all of these meetings and other things occurred prior to the publication of this article in the paper and Mr. Borg was the subject of discussion in all of those meetings and all of those talks. This jury may be called upon to determine whether this article was damaging or whether he was damaged entirely by the public meetings, the demands for grand juries and other matters that transpired before the publishing of this article. He may answer.

A. Could I have that question again, please?

(Question read by reporter.)

A. I don't think that I knew that day. Subsequently, of course, I found out that there were

(Testimony of Melvin Alsager.)

petitions filed but [178] I don't think on that day that I knew anything about it, that is about the petition.

Q. Did you, subsequent to that day, prior to May 13, have any knowledge of such petitions?

A. Yes, I did.

Q. Have you any idea of the number of names on those petitions?

A. Well, the first I heard was 800 and then it got to 1400——

Mr. Tonkoff: ——That is objected to as hearsay.

The Court: The objection is sustained.

Mr. Clements: We will withdraw the question.

Q. Are you acquainted with Captain T. C. Thomas, the commanding officer of the N.R.O.T.C. at the University? A. Yes.

Q. Had you known him prior to May 13, 1953, or had you become acquainted with him?

A. Yes.

Q. Had you consulted with Captain Thomas or had he consulted you in regard to this Richard Shoup and the difficulty that he was involved in?

A. He consulted me.

Q. Was that frequently or otherwise?

A. It wasn't frequently. The first time he consulted me was [179] in the latter part of January, that was the first that I ever met Captain Thomas when he came to my office and informed me that this boy——

(Testimony of Melvin Alsager.)

Mr. Tonkoff: —Of Course, I object to what Captain Thomas has informed him.

The Court: He may answer.

A. Captain Thomas informed me that this boy, Richard Shoup, was not doing well in school, as a matter of fact that he was failing in his subject. He came to me at that time to just generally discuss what effect possibly this entire incident in the early part of January had had on the boy. That is the first time I ever met Captain Thomas.

Mr. Tonkoff: I move that be stricken. I don't want to continually object but I feel it is my duty.

The Court: Oh, yes, don't hesitate to make any objection that you care to make. I will try to rule as near right as I can.

Mr. Tonkoff: That is true, what I am referring to is continually getting up and down to make these objections.

The Court: Yes, but you go right ahead with what objections you desire to make.

Mr. Tonkoff: Your Honor, this is [180] something that Captain Thomas told him, as to what effect this might have, and in my opinion it is not admissible, certainly it is a conclusion that he might draw one way or another and it has nothing to do with the issues set forth here. In other words, your Honor, I take the position that if the plaintiff can recover he can only recover on what is set forth in Paragraph 5 and in that statement there is nothing about any remark or any statements that may have been made such as the witness is testifying about.

(Testimony of Melvin Alsager.)

The Court: I will instruct this jury later to take the article as a whole and not pick out any one clause in it but to take the entire article. If I remember right Shoup's story was told in this article, I haven't found it as yet. Yes, it says, "In the meantime Captain Thomas was explaining that the boy Shoup was undergoing a strain which was evidenced in bad grades and the possibility that he would be expelled from the Naval R.O.T.C." He may answer. That was on a motion to strike, was it not?

Mr. Clements: Yes, it was, your Honor.

The Court: The motion will be denied.

Mr. Clements: You may cross-examine. [181]

Cross-Examination

By Mr. Tonkoff:

Q. When were you admitted to the practice?

A. November 21, 1950.

Q. And between 1950 and the time that you took office as Prosecuting Attorney you were practicing in Moscow, I assume?

A. That is correct.

Q. And during the course of that practice you attended a hearing at the Police Court in which Judge Borg presided?

A. Yes.

Q. Mr. Alsager, that wasn't a preliminary hearing, was it?

A. I don't recall,—I think it was a State of Idaho case, it was a criminal matter all right, but whether it was a preliminary hearing I don't recollect.

(Testimony of Melvin Alsager.)

Q. What kind of a case was it, was it a traffic case or what?

A. No, if my recollection is correct, it was a case in which a fellow was selling literature here in town without a valid permit and a bond and so forth, and I was representing him in that matter.

Q. That is where he had his trial, is that right, it was a city matter connected with the city, a violation of the city ordinance, is that right?

A. I believe that Mr. O'Donnell was on the other side.

Q. That has nothing to do with what I am asking you. The [182] matter in which you appeared to defend this man was in violation of a city ordinance, isn't that right?

A. I don't know whether it was city or state, I just don't recollect.

Q. There is no similarity between defending a violation of the city or the state and a preliminary hearing, is there?

A. There is a difference.

Q. And the matters which concern or rather were concerned with preliminary hearings, so far as you know, they were held in the district courtroom in the Courthouse?

A. I didn't know that, no.

Q. After practicing here for two years you mean to say that you didn't know that?

A. I never had a preliminary hearing, when I was defending cases here, in the Courthouse, no, I never had one.

Q. Well, from your association with other coun-

(Testimony of Melvin Alsager.)

sel or things that you read in the paper, didn't you discover that such matters as preliminary hearings were held before the Probate Judge?

A. Well, if they are held before the Probate Judge, they are usually held in his office at the Courthouse.

Q. And that was the kind of a hearing that Mr. Estes was involved in, wasn't it?

A. Well, the difference, of course, being that this was in [183] the Justice Court and not in the Probate Court.

Q. When did you first learn about the controversy between Estes and Shoup?

A. Well, it was sometime between the time of the incident and when I was sworn into office. In passing along the street someone had mentioned it to me, that is how I knew about it.

Q. You read it in the paper, didn't you?

A. As I recall, there was nothing in the paper after that incident on the 14th of December until after I was sworn into office. I don't believe that I read it.

Q. Your testimony is that you read nothing about the incident in the paper between the 14th of December and the time that you took office? When was that, was that on the 14th?

A. I took office on the 12th of January and I don't recall reading it in the paper. It might have been in the paper but I don't recall reading it.

Q. But you knew about the incident?

A. Yes, on the street. Someone accosted me on

(Testimony of Melvin Alsager.)

the street and that was the first that I ever heard of it and that was after Christmas, I think, although I am not certain.

Q. You took office on the 12th of January?

A. Yes.

Q. And I believe that you told Mr. Clements that within 10 minutes after you took office this complaint was filed [184] against Mr. Estes?

A. Yes.

Q. Did you know that it was going to be filed?

A. I had no knowledge whatever.

Q. Now, up to this time had you ever discussed this incident with Mr. O'Donnell, the former prosecutor?

A. Just in passing, when we were moving some of the county supplies over to my office. It was not gone into as to the merits, it was just in passing.

Q. So you knew there was something brewing concerning the matter at the time you were moving your supplies from one office to the other?

A. Yes, I knew that there was something about but I knew nothing about the merits of the case whatever, we didn't even discuss that.

Q. Will you state whether or not you knew who prepared that complaint against Mr. Estes?

A. I didn't know at the time it was filed.

Q. Did you subsequently learn? A. Yes.

Q. When did you subsequently learn who prepared the complaint?

A. I think that it was Tuesday morning that I got a telephone call from an attorney at Lewiston.

(Testimony of Melvin Alsager.)

Q. By the name of Henry Felton?

A. Yes, Henry Felton. [185]

Q. When was Tuesday, would that be the 12th or the 13th? A. That was the 13th.

Q. And you took office on Monday the 12th?

A. Yes.

Q. At what time did you receive that call?

A. Well, it was before I had gone to the office in the morning and I usually go at nine, so it was before that.

Q. He called you at your home? A. Yes.

Q. And he advised you that he had prepared this complaint against Mr. Estes?

A. Yes, I got it from his conversation that he was the one who prepared it all right.

Q. And you got this information on Tuesday the 13th? A. Yes.

Q. When was the complaint filed?

A. It was filed on Monday, I don't know the exact time but it was between 2:00 and 2:30 sometime.

Q. When did you have the first conversation with Mr. Huff,—Mr. Laurence Huff, concerning this complaint? A. Monday afternoon.

Q. And isn't it a fact that on Monday afternoon Mr. Huff told you that Henry Felton had prepared this complaint against Mr. Estes?

A. I don't recall that, no. [186]

Q. Isn't it a fact that he talked to you about the preparation of this complaint by Mr. Felton on Tuesday the 13th?

(Testimony of Melvin Alsager.)

A. He may have talked to me about it at the Courthouse that morning or in my office, yes, he might have.

Q. I mean in your office?

A. He may have.

Q. Isn't it a fact that you told him that you would not tolerate the filing of a complaint by an attorney outside of your office, that you were the proper party to file that complaint?

A. I don't know whether I said anything in those words or substance. I know I was a little bit peeved that someone went around me without going through my office in the first instance.

Q. That is what I mean, and at that time you told him that you were not going to permit that, and that you were going to prepare a motion for dismissal, which I believe was Exhibit 11, here. Isn't it a fact that that conversation resulted in the writing up of this petition to dismiss?

A. I never said that I would prepare a motion at all. That was Mr. Huff's offer to me.

Q. When did you have that conversation with Mr. Huff?

A. I had two conversations with him, one on Monday afternoon and one on Tuesday [187] morning.

Q. And this document marked Exhibit No. 11 which was read to the jury, a motion for dismissal, you say that was prepared by Mr. Huff?

A. As far as I know, it wasn't prepared in my office at all, he brought it in to my office.

(Testimony of Melvin Alsager.)

Q. And you and he never discussed the contents of this motion, is that your testimony?

A. Monday afternoon he mentioned a motion to dismiss,—no, not the contents, I don't think that we ever discussed the contents of it.

Q. How did you happen to talk about a motion to dismiss on Monday afternoon when you didn't know that Henry Felton had prepared this complaint until Tuesday—when he called you on Tuesday?

A. Tuesday was the first time that I definitely knew that Henry Felton had prepared that complaint. I didn't know it before that time.

Q. Then why were you talking about the dismissal of this complaint on Monday afternoon with Mr. Huff?

A. Well, I don't recall on Monday afternoon of discussing Henry Felton in so many words. I don't recall that.

Q. You signed this document, did you not, Exhibit No. 11?

A. Yes, Tuesday morning.

Q. And you left it with Judge Martinson?

A. Yes, I brought it up there, that is [188] correct.

Q. And it was delivered to you when?

A. That was delivered to me on Tuesday morning by Mr. Huff, about 10:00 o'clock, I would judge.

Q. You read the contents of it?

A. Yes.

Q. And, of course, you would not sign a docu-

(Testimony of Melvin Alsager.)

ment that didn't represent what it says, over your signature, would you?

A. If you mean did I read it before I signed it, yes.

Q. Now, Mr. Alsager, this motion says as follows: "That the complaint in the above-entitled matter, apparently prepared by a private attorney, was filed in the above-entitled court on January 12, 1953." You knew that when you signed this document, didn't you?

A. Would you repeat those words again?

Q. Yes,—“That the complaint in the above-entitled matter, apparently prepared by a private attorney, was filed in the above-entitled court on January 12, 1953, in less than 10 minutes from the time when the undersigned was sworn into the office of Prosecuting Attorney of Latah County.” That is correct, isn't it?

A. That is correct.

Q. “It appears from such complaint that the alleged incidents upon which such complaint arose occurred on December 14, 1952, approximately one month prior to the date of the filing of the complaint.” That is correct, isn't it? [189]

A. That is correct.

Q. “The undersigned was not consulted by the complaining witness or any person on his behalf either before or since such complaint was filed.” That is correct, is it?

A. That is correct.

Q. “That the matter was investigated by J. M. O'Donnell, the undersigned's predecessor in office, and Mr. O'Donnell was unable to find any evidence

(Testimony of Melvin Alsager.)

whatsoever about which to base a felony charge, nor did the complaining witness ever request Mr. O'Donnell to file a felony complaint." Is that correct?

A. Yes, I believe that is correct.

Q. Mr. O'Donnell had been Prosecuting Attorney in this county for 10 years prior to your taking over the office, hadn't he?

A. Yes, I believe 10 years.

Q. And did you believe that, Mr. Alsager?

A. Well, he had done nothing with the case from December 14, until I took office.

Q. There never was anything done about any felony charge against Mr. Estes, concerning the State of Idaho and Mr. Estes and Mr. Shoup, was there?

A. There was nothing done, if that is what you mean; there was nothing done about anything. [190]

Q. When you filed a complaint or caused one to be filed it was on a charge of battery and not assault with a deadly weapon, was it?

A. I never filed the original complaint in this matter. That was filed by a private citizen, and it was assault with a deadly weapon.

Q. I am talking about Mr. Shoup; we are talking about Mr. Shoup now. This is the State of Idaho vs. Murray Estes, in which Shoup was assaulted. I say, you never did prepare a complaint against Mr. Estes charging him with assault with a deadly weapon as against Shoup? A. No, I did not.

Q. So that this complaint that was filed on the 12th in Judge Martinson's Court was apparently

(Testimony of Melvin Alsager.)

when you made the statement that there was nothing to the merits of that case and that was apparently right, wasn't it?

A. I had never consulted the witnesses up to that time, in fact, I had never met Mr. Shoup.

Q. And even after you met him, you didn't file another complaint charging him with assault with a deadly weapon, and I am referring to Mr. Estes, because you charged him with a battery?

A. No, in the second instance I charged Mr. Estes with assault with a deadly weapon against Mr. Greene, after checking all the witnesses. [191]

Q. I am talking about Mr. Shoup now, we will get to Mr. Greene later on. You never did file a complaint against Mr. Estes charging him with assaulting Shoup with a deadly weapon, did you?

A. You mean personally did I file one or anyone else?

Q. There was a battery charge filed against Mr. Estes, subsequently so that this statement that you signed, this paragraph that I read from, over your signature, that is correct, isn't it?

A. It is substantially correct.

Q. Now, lets move to the next one here. "The undersigned is informed and believes that the complaint was filed herein as a foundation for a civil action." You believed that, didn't you?

A. I knew that because I had talked to Mr. Felton in the morning and I could see the drift of the thing, there was no doubt about it. I had talked to Felton, that transpired between the meeting with

(Testimony of Melvin Alsager.)

Mr. Huff and this document. I talked to Mr. Felton on the telephone and——

Q. And Mr. Felton told you that he was going to bring suit against Mr. Estes in a civil action?

A. I don't believe that he mentioned that in the telephone conversation, no.

Q. But you arrived at the conclusion, after talking with him [192] over the telephone that a civil action would be filed against Mr. Estes as a result of this incident on December the 14th in the Perch, is that right?

A. Well, I was a little perturbed at Mr. Felton because of his coming through the back door, so to speak, and putting me on the spot in this manner. It wasn't a very friendly conversation with Mr. Felton, if that is what you mean, and in general I got the impression that there was something underhanded going on that I wasn't quite aware of but he never told me that he was going to file a suit, a civil action, he never told me.

Q. But you were convinced of that, were you not, that is, that there was something underhanded going on?

A. I reasoned after talking to Mr. Felton that there was something funny about the whole thing, there is no question about that.

Q. And the complaint was worded in such a way that it didn't exactly charge him with assault with a deadly weapon. In other words, there was a lot of superfluous language in it?

A. Yes, and that is primarily the basis for this

(Testimony of Melvin Alsager.)

thing. I had studied the complaint by this time and I hadn't studied the complaint at all at the time when Mr. Huff came in. I realized that the complaint that was filed was all fouled up. There were two or three crimes in the one complaint and it was just a bad complaint. [193]

Q. And that is why you told Laurence Huff that you would not appear and that this motion for dismissal should be filed?

Mr. Clements: Just a minute, I don't believe that the witness has so testified.

Mr. Tonkoff: This is cross-examination, your Honor, and certainly I am not going to ask a question on a matter that I cannot substantiate by Mr. Huff at a latter time.

The Court: You may go ahead.

A. Would you let me have that question again?

(Question read by reporter.)

A. On the contrary, I never told Mr. Huff that I would not appear, I told him that I would appear.

Q. You told Mr. Huff definitely that you would appear at the time that you signed this motion for dismissal prepared by him?

A. No, not at that time, it was on the following day, I believe.

Q. You mean that you——

A. I don't recall saying that I wouldn't appear at that meeting with Mr. Huff, I don't recall that at all, any statement that I would not appear

(Testimony of Melvin Alsager.)

if a hearing was held. I don't believe that we even discussed that matter.

Q. Did Mr. Huff request you to sign this motion for dismissal?

A. Not only that, he persuaded me to sign [194] it.

Q. You mean that he persuaded you against your better judgment?

A. Not exactly, I never had talked to the complaining witness—it was a complaint that was bad in the first instance. I just wanted to be in on the ground floor and start the thing myself. I didn't like the looks of the entire thing and that was kind of the basis for this whole thing here.

Q. I can understand that, Mr. Alsager, but the point is,—you intended to dismiss this case brought in Judge Martinson's Court on the complaint prepared by Henry Felton out of Lewiston, is that right?

A. I had that intention in my office but when I got up to the Courthouse I had a change of mind and I——

Q. When you got up to what Courthouse?

A. Up to the Probate Judge there and we talked it over for some time and when it got down to tendering or filing this particular document I said that it was not to be filed and to my best recollection it was never filed but I never took it back, but we never filed it.

Q. Why did you leave it with Judge Martinson if you didn't intend it to be filed?

(Testimony of Melvin Alsager.)

A. Well, we left it in this way, I told Judge Martinson not to file it and I told him not to do anything with that document until he heard from me further and, of course, I didn't pick it up and carry it with me. It was laying on Judge Martinson's desk, but I specifically instructed him not to file it. [195]

Q. Mr. Alsager, knowing that there was a defective complaint filed against this man charging him with assault with a deadly weapon, certainly you would not proceed to trial on such a complaint, would you?

A. That is the reason that I subsequently filed one myself.

Q. But you would have to dispose of the complaint that was then on file by way of a dismissal, wouldn't you?

A. If you were going to charge the same individual, possibly, but I changed it around to suit the facts of the situation.

Q. The question is this, you would not go to trial on that defective complaint and you would dismiss it, wouldn't you, before you would go to trial and you would file another case, wouldn't you?

A. I didn't like the complaint, if that is what you mean.

Q. Yes, and being a lawyer and being elected as prosecutor in this county, you wanted to proceed on proper complaints, didn't you?

A. Well, I always like to be on the ground floor to begin with so I know where I am going because

(Testimony of Melvin Alsager.)

once something like this is filed I am responsible for carrying the ball thereafter. I could see many difficulties in this thing, in other words, I was getting a back start here instead of being on the ground floor.

Q. You are absolutely right, so in order to get on the ground floor it was necessary to dispose of and to dismiss this [196] complaint that was prepared by Henry Felton of Lewiston and to start on the ground floor and start over again, wouldn't you?

Mr. Clements: I will object to that, your Honor; it is argumentative.

The Court: It is very apparent to the Court that the witness was a very young practitioner, that he had just started out to practice law. Of course, I think that he took an examination to admit him to practice but the attorney who is examining him is an older and experienced attorney and there might have been some matters of law that this witness did not know about at the time that he first started out as Prosecuting Attorney. I don't know as I could stand up under a cross-examination as to what the law is. I think it is very apparent that the witness is trying to do the very best that he can and I don't think that you should examine him as to his knowledge of the law.

Mr. Tonkoff: Your Honor, I am not examining him as to his knowledge of the law. The question is wouldn't he have to dismiss that defective complaint

(Testimony of Melvin Alsager.)

which he has said was defective, that is the question, what he would do.

The Court: It is very apparent that he got all of his information from Mr. Huff and he acted on the information that he got from Mr. Huff. He was being advised [197] by a very able attorney, one of the ablest attorneys in the state,—he was young and had only been in office a few hours at that time. I think this examination is going a little bit beyond the bounds of reason, but you may go ahead.

Q. Mr. Alsager, Mr. Huff said here that he was the Dean of the bar, the oldest member of the bar, is that right?

A. Yes, he is the oldest member, the oldest one admitted to the bar, that is to the bar association that we have here.

Q. And there is no doubt about his veracity or integrity, is there? A. No.

Q. Mr. Alsager, after you went up to the Probate Court, was that on the 13th?

A. That would be on the morning of the 13th, yes.

Q. Was Mr. Huff present with you?

A. I believe that we went up together, whether we went in my car or in his I am not certain, but we went up there together.

Q. Did Mr. Huff hear all of the conversation between yourself and Judge Martinson?

A. Yes, he was present right there in the same room, we were all right there.

Q. And up to that time had you told him that

(Testimony of Melvin Alsager.)

you were not going to appear at this hearing?

A. I don't believe that there was any talk about appearance at [198] all up to that time. I mean about appearance, there was no talk about it.

Q. Did you ever tell him that you were not going to appear?

A. Well, the following Wednesday during the noon hour or after lunch, I went and told him that this case was not going to be dismissed and that I would appear at the hearing, that was the following day.

Q. That was the 14th?

A. Yes, sir, on the next day.

Q. Now, when you were up to Judge Martinson's office on the 13th, this case was set for hearing for nine o'clock on the 15th, wasn't it?

A. I believe that it had been set at that time, yes, I believe so.

Q. And you knew that, didn't you?

A. Yes, I believe that I knew it.

Q. And you knew that the hearing was set for nine o'clock on the 15th, at Judge Martinson's at the Courthouse, didn't you?

A. It was set in the Probate Judge's office, I believe.

Q. That is at the Courthouse?

A. Yes, at the Courthouse.

Q. Have you ever attended any of those preliminary hearings during your practice?

A. Well, I tell you, I think——

(Testimony of Melvin Alsager.)

Q. Prior to the time that you were elected [199] Prosecutor?

A. I think that I attended probably one, yes, I think I attended one.

Q. And that was at the district Courthouse, wasn't it? A. Yes.

Q. You and Mr. Huff met, you say, at your office? A. Yes.

Q. At that time did you examine Section 312604 of the Idaho Code with Mr. Huff?

A. I can't recall what books we examined, I don't remember just what we examined.

Q. Isn't it a fact that Mr. Huff and you read that section and in that section it is provided that you are not required to appear before the Judge. Do you remember reading that section?

Mr. Clements: What was the number of that section?

Mr. Tonkoff: 312604.

The Court: There is no such section.

Mr. Tonkoff: 31-2604, your Honor.

The Court: That section says that he is to appear when called by the Judge that is hearing the case. If the Judge wants the Prosecuting Attorney to appear, he calls him.

Q. I will merely ask, did you read that section?

A. We may have read it that morning, but I was familiar with that [200] section before this whole thing started, if that is what you mean. That is the reason I went over to Borg when he had not called me for two or three hours and I went over to Borg's

(Testimony of Melvin Alsager.)

specifically to ask if he was going to call me, and and to tell him that I was going to be present whether he called me or not.

Q. You went to see Judge Borg when, on the 14th?

A. Yes, that would be Wednesday afternoon on the 14th.

Q. At that time and place did you tell him that this was a hot potato, referring to the Estes case, or did you in words of similar import?

A. I don't believe I told him that, he may have told me, but I didn't tell him that.

Q. Was that language spoken either by you or by him at the Elks Club, on the afternoon of the 14th, when you saw him?

A. He may have spoken that, yes, he may have said that but I didn't say that.

Q. You didn't say anything about that?

A. No, I didn't say anything about a hot potato myself, no.

Q. Did you tell him that the law provided that you didn't need to appear, that you didn't have to appear, did you tell him that?

A. Well, in words and substance, I asked him if he was going to call me and he said no, and I told him, I said I am [201] going over there, I am going to appear.

Q. And you told Judge Borg on the evening of the 14th, that you were going to appear at this hearing? A. Yes.

Q. Then why did you call him at eight o'clock on

(Testimony of Melvin Alsager.)

the following day to advise him that you were going to appear?

A. I wanted to make certain that we were not going to have any mixup on this thing.

Q. What made you suspicious that there might be a mixup in this thing?

A. I wasn't suspicious at all, I just called him up to advise him, to remind him that I was going to be there.

Q. You did that at eight o'clock in the morning at his home? A. Yes.

Q. The Police Station is quite small, about twice the size of this dais (indicating). I think that is the way it was described. Would that be about right as to the area?

A. Well, it is probably a little bigger than that; yes, I believe it is.

Q. It had two desks in it? A. Yes.

Q. One was about four by six and the other about a three by four or at least a three by four?

A. Yes, I would say so.

The Court: We will adjourn at this time [202] until 2:00 o'clock this afternoon.

April 7, 1954, 2:00 P.M.

The Court: The jury are all present, you may proceed.

Q. Mr. Alsager, I think that I asked you before the recess about the size of the Police Courtroom, and you said that it was a little larger than twice

(Testimony of Melvin Alsager.)

the size of the dais where the jury is, is that right?

A. Yes, I would say so.

Q. And there are seven chairs in there, is that about right?

A. Well, there are some stationary chairs, that would be about right, I believe, some of the chairs are up against the wall, stationary chairs.

Q. And that is not adequate to hold a preliminary hearing, due to its size, is it?

A. I would not say that, of course, if the interest in the case is great there would possibly not be enough room, but normally with just a witness or two and the parties then it would be big enough, yes.

Q. But you do know that if there are a lot of witnesses then there isn't sufficient room?

A. There is room for a considerable number of witnesses. [203]

Q. About how many?

A. Well, of course, all of the witnesses would not have to be in there at the same time.

Q. The point is, it wasn't adequate to hold the second preliminary hearing and that is the reason you transferred it up to the Courthouse, isn't that right?

A. That is correct, but, of course, there was a lot of publicity between the first one and the second one. Several people who didn't attend the first one certainly were at the second one.

Q. You had nine witnesses yourself at the first one, didn't you?

A. That is correct.

(Testimony of Melvin Alsager.)

Q. And yourself, that would be ten, and of course you assumed that Mr. Estes and his lawyer would be there? A. Yes.

Q. And that room wouldn't be sufficient for a hearing of that kind, it would be more adequate to hold it at the Courthouse, the district courtroom, would it not?

A. It could be held there, yes.

Q. You stated that you came back to the Police Station about 15 minutes after nine, did you?

A. I said that I came back to the Police Station.

Q. Perhaps I am not making myself too clear. After you picked up a stenographer at the University, you say that you picked up this stenographer about 10 minutes to nine? [204]

A. That is correct.

Q. And that was up at the University?

A. Yes, well, I really picked her up in the West Six Village. That is where I had to go to pick her up.

Q. How far is that from the Police Station?

A. I don't know. I am a poor judge of distance, but it might be a half mile, I guess it would be about a half mile, I know that it is in the city limits.

Q. I am not familiar with this town, would that be east or west, the University?

A. That is west.

Q. Who was this stenographer?

A. Well, the name slips my mind at the moment.

Q. Did you know her before this time?

A. No, it was someone that was given to me by

(Testimony of Melvin Alsager.)

the Personnel Department at the University. I had never seen her before in my life.

Q. As a matter of fact you didn't hire a stenographer, you didn't hire Mr. Tunnicliff to report the case, did you?

A. I called Mr. Tunnicliff prior to that time and he informed me that he would be out of town and would not be able to report it.

Q. As a matter of fact didn't you tell Mr. Tunnicliff that you didn't know that you were required to have a stenographer there. Did you ever make that statement to Mr. Tunnicliff? [205]

A. I don't believe that I made that statement, no, sir.

Q. Mr. Clements called you in connection with this case, didn't he?

A. He gave me a phone call once, yes, sir.

Q. Did he tell you anything about dismissing it because Henry Felton was involved in it?

A. No, no, all that he said was that if I needed any help he would be glad to help me in it.

Q. Give you some help against Mr. Estes?

A. He didn't say for or against, all he said was that if you need any assistance you can feel free to call on me and, as I remember, that was nothing more said about it, nothing was discussed in regard to the merits of the case.

Q. What date was that,—refreshing your recollection, wasn't it the same day that you filed this motion of dismissal or left it with Judge Martinson?

(Testimony of Melvin Alsager.)

A. To tell you the truth I don't just remember which day that was that I received that phone call. I received so many phone calls during that time that I would not say exactly when I received that particular call, whether it was that day or some other time.

Q. You say that you received a lot of phone calls in connection with that matter on that day?

A. Well, I had the newspapers calling me and many people calling me, there seemed to be an unsurmountable number of [206] calls coming into me, to my home and to my office.

Q. And did you tell the newspapers that this complaint was faulty and that it contained three charges and should have contained but one and that you were going to dismiss it? A. No.

Q. What did you tell them?

A. I don't know what I did tell them exactly.

Q. What did they inquire?

A. Well, they were inquiring about what happened.

Q. As a matter of fact, Mr. Alsager, you could have filed a complaint the very same day that it was dismissed, a proper complaint, you could have filed it with Judge Borg, couldn't you?

A. I could have but I had never consulted the witnesses, I had never seen the complaining witness and I had no basis to go on other than the complaint itself and I wanted to have a chance to interrogate the plaintiff or complaining witness and so on.

(Testimony of Melvin Alsager.)

Q. You hadn't consulted the complaining witness, you say?

A. Which day are you talking about now?

Q. The first day, the 15th?

A. Well, you see, I never talked to this boy Shoup, until the following Wednesday and I wasn't going to file another complaint or to prepare one without talking to him.

Q. You had talked to him on the evening of the 14th because you [207] told Judge Borg, you say, that you were going to appear the next morning, according to your testimony. Certainly you had talked to him on the evening of the 14th, hadn't you, Mr. Alsager?

A. I talked to Mr. Shoup for the first time on Wednesday, the day of the scheduled hearing.

Q. At any rate you didn't file a complaint the next day or the next day nor the following day, you never did file another complaint against Mr. Estes for assault with a deadly weapon, did you?

A. Yes, I did, the following Sunday I filed a charge of assault with a deadly weapon.

Q. In which Shoup was the complaining witness?

A. I filed that myself.

Q. The question is, Mr. Alsager, you never did file a complaint charging Mr. Estes with assault with a deadly weapon, where Shoup was the complaining witness, did you?

A. No.

Q. Did you ever have a conversation with Mr. Estes in your office about the 13th of January?

A. I don't know whether it was that day or not.

(Testimony of Melvin Alsager.)

We had one meeting in the office where Mr. Huff was along with him, is that the one you mean?

Q. No, sir, Mr. Estes was alone, on the evening of the 13th? [208]

A. I believe that Mr. Estes was trying to get a hold of me all of that day.

Q. The question is did you have a conversation with him at your office on the evening of the 13th, at 7:00 o'clock?

A. I don't believe so, I think the first conversation I had was on the telephone at home. I think he called me and I talked to him at home, but I don't think that I talked to him personally at my office prior to that time, as far as I can recollect now.

Q. Your office is across the street from him, upstairs? A. Yes.

Q. Did you ever have a conversation with him prior to this hearing at your office in the building across the street?

A. A telephone conversation that he called.

Q. Now, the question is did you have a conversation with him in your office? You either did or didn't.

A. I do not recollect whether I did or not. I cannot say that I didn't and I wouldn't say that I did.

Q. Did you at any time over the phone or personally prior to January the 15th, either on the phone or in your office, tell Mr. Estes that you were not going to appear and that you were going to dismiss this case?

(Testimony of Melvin Alsager.)

A. I do not believe so. I do not believe so, no.

Q. Did you ever tell anybody that you were going to dismiss this case prior to the hearing on January 15, 1953? [209]

A. I don't recall that I told anybody that I was going to dismiss it other than this motion-to-dismiss business, I don't believe so.

Q. Did you ever tell Mr. Huff, that?

A. No, only this motion that he brought over to me, only in that sense.

Q. Isn't it a fact that when you left this motion with Judge Martinson in his office that you told him that you intended for him to file it, that was on the 13th, I believe?

A. When I left that in his office Mr. Martinson asked me specifically, "Are you tendering this for filing?" And I said, "No, you are not to file that piece of paper or to do anything more until I inform you about it." And to the best of my recollection it was never filed.

Q. Did you see Judge Martinson the following day, the 14th?

A. That would be Wednesday, is that correct?

Q. Yes, I assume that is right, yes, Wednesday.

A. I don't know that I saw him personally, but he called me on the phone and told me that he was disqualifying himself, or had disqualified himself.

Q. And he told you to come up and get this motion to dismiss and take it out of his office, did he not?

A. Do you mean at the time that he called me?

(Testimony of Melvin Alsager.)

Q. That is what we are talking about, the 14th?

A. You mean at the time that he called me about that he had [210] disqualified himself?

Q. I assume so if that was the 14th.

A. You mean in that same conversation?

Q. I don't care what conversation, at any time, on the 14th did he——

The Court: Now, there is no use of getting fussy about this, just take it quietly and be calm. You have a witness here on the stand and just go ahead and examine him.

Q. Did you at any time on the 14th, either at the time of that telephone conversation or any other, were you advised by Judge Martinson to come up and get this dismissal, this Exhibit No. 11?

A. I don't think so, I don't recall that.

Q. Did you go up there and pick it up from Judge Martinson's office on the 14th?

A. To the best of my recollection I never did pick up that original copy, no.

Q. Did you send anybody up for it?

A. No.

Q. Did you ever have it in your possession after you left it at Judge Martinson's office?

A. I don't believe I ever did. I was never able to find that original and I don't believe that I ever went up and got it. [211]

Q. Where did you get that copy?

A. Well, that was left with me that morning. When Mr. Huff came over he had copies made and

(Testimony of Melvin Alsager.)

he left a copy with me and we left a copy in my office before we went up to the Courthouse.

Q. And this was not done on your typewriter?

A. No, that was not even done in my office at all.

Q. Now, Mr. Alsager, going back to the time that you say you picked up the stenographer, whose name you don't remember and went back to the Police Station, what time did you arrive at the Police Station?

A. To the best of my recollection it would be between five minutes to nine and nine o'clock, along in there some place.

Q. Where were your witnesses at that time?

A. They were standing right there at the Police Station.

Q. When you went in there what did you do?

A. Well, I went in and looked around immediately, and, of course, thinking to see the other side there, and not seeing the Judge or any of the other parties there, I immediately called the desk clerk there and tried to find Mr. Borg on the telephone. I asked her to do that, which she started doing.

Q. Did you call his home?

A. I didn't call at all.

Q. Did she call his home?

A. Yes, I think she did. I think she called his home. Of course, [212] I didn't do any calling personally, but I think she called his home, although I don't know.

Q. What time was it when you saw him down at the Police Station?

A. You mean Mr. Borg?

Q. Yes.

(Testimony of Melvin Alsager.)

A. I would say that it might have been 9:15.

Q. You arrived there from five minutes to 9:00 until 9:00 o'clock, between five minutes to 9:00 and 9:00, and you had to get him at the Courthouse and then I assume that he walked down, you saw him walk down?

A. I have no knowledge whatever as to how he got there.

Q. But your best recollection, I assume, is that he got there at 9:15? A. That is right.

Q. Now, isn't it a fact that you made a call to Wynn Blake, the Prosecuting Attorney at Lewiston, Nez Perce County, on the 14th day of January, 1953?

A. I may have made a call. I don't recall it necessarily, but then it may have been, although it doesn't stand out in my mind at this time, I may have.

Q. And you called him for the specific purpose of getting information concerning this Estes case?

A. I may have called him, yes. I don't recollect it exactly now. [213]

Q. Your testimony is that you may have called him? A. Yes, I don't deny that I called him.

Q. For what other purpose would you call him except about this Estes case, that is, on January the 14th?

A. If I did call him, it may have been in connection with this case. Blake and myself call back and forth here in the last year and a half, we consult

(Testimony of Melvin Alsager.)

one another on different matters here, but it may have been in connection with this case all right.

Q. Did you consult with him in relation to this case? A. I may have, yes.

Q. Do you remember the advice that he gave you?

A. Well, of course, I don't even remember my conversation with him.

Q. Do you have any distinct recollection of your conversation with Mr. Clements?

A. Only to the extent that I told you about, yes, that is all.

Q. Isn't it a fact that Mr. Blake told you that Henry Felton had prepared this complaint and for you to ignore it?

A. I don't recollect that, no.

Q. Do you recollect any of the conversation?

A. No, I do not, not even my own conversation.

Q. How do you recollect the conversation so clearly with Judge Borg in the Elks Club, at five o'clock on January the 14th, that you have testified about? [214]

Mr. Clements: We object to that as being argumentative.

The Court: Well, counsel is making quite an effort here to see if he can mix this witness up. I will let him go. I don't know whether counsel has ever been on the witness stand or not, but I have and I know that it is a pretty hard thing to contend with a lawyer sometimes when you are on the stand.

(Testimony of Melvin Alsager.)

Mr. Tonkoff: I just got off the witness stand last week, your Honor, and I think I should have an A for effort.

The Court: You just go after him as hard as you want to.

Mr. Tonkoff: That isn't the point of this cross-examination at all, your Honor.

The Court: That is the way it appears to the Court.

Q. Who did you hire to take the notes at that second hearing?

A. I called Mr. Tunnicliff and asked if he would be available to take it and he said he would.

Q. Did he take it? A. Yes, he did.

Q. Isn't it a fact that Mr. Estes hired him and paid him to take that testimony?

A. Mr. Estes may have hired him too, as far as I know. I didn't [215] hire him; I called him and asked if he would be available. That is all I had to do, was to ask him if he would be available to take the testimony, and he assured me that he would be and that is as far as I went on the thing.

Q. But he was there?

A. Oh, yes, he was there.

Q. Did you ever pay him, I mean did the county pay him for his service?

A. There was no bill ever presented to the county by Mr. Tunnicliff, because that would have to be okayed through my office, and to the best of my recollection there was no bill presented by Mr. Tunnicliff.

(Testimony of Melvin Alsager.)

Q. Do you recollect of having a second motion for dismissal prepared?

The Court: Aren't we going back over the same questions that were asked here this morning? It seems to me that we are rehashing the same thing over and over, and in the interest of time I don't think that it is necessary to repeat all of this.

Mr. Tonkoff: I am inquiring about the second motion to dismiss, and this is the first time I have asked about it.

The Court: It seems that I remember that you asked him about the second motion to dismiss, but you may ask him again. [216]

Mr. Tonkoff: If I did I don't have any recollection of it.

Q. Do you remember, Mr. Alsager, have you testified anything about a second motion for dismissal up to this time, yesterday or any time up to this time?

A. Well, I don't believe so, no, I don't think I did.

Q. Can you tell us anything about this second motion for dismissal that was prepared?

A. Frankly I don't know what you are talking about, I cannot place it.

Q. You have no recollection of a second motion for dismissal, such as Exhibit 11 here, being presented to you by Mr. Huff?

A. No, I believe that is the only one that was presented to me.

Q. Now, you caused a complaint to be issued on

(Testimony of Melvin Alsager.)

the 17th of January, did you not, charging Mr. Estes with a second felony against Greene?

A. Yes, I believe that is the date.

Q. That was Saturday the 17th?

A. I believe it was Sunday.

Q. You had him arrested on Sunday and brought down to the Police Station, or caused him to be arrested?

A. Yes. [217]

Mr. Tonkoff: I think that's all.

Redirect Examination

By Mr. Clements:

Q. Referring to the complaint, the first charge against Mr. Estes that is referred to as having been prepared by Henry Felton of Lewiston, prior to the time that case was dismissed, had there been served upon you by Mr. Estes or his attorneys any demurrer to the complaint, or any motion to quash it, or any legal paper that attacked the sufficiency of the complaint?

A. No.

Mr. Clements: That's all.

Recross-Examination

By Mr. Tonkoff:

Q. Mr. Alsager, isn't it a fact that Mr. Estes offered to submit a motion or to approve an order reopening the case and going on with the hearing that was dismissed on January the 15th, by Judge Borg?

(Testimony of Melvin Alsager.)

A. He called me and told me that he would be willing to have that hearing taken and that he would appear at a time and place that I would set to hear the case.

Q. In other words, he offered to apply or have you apply to the Court to set aside the motion for dismissal and to go ahead as though a dismissal had never been made or entered in the [218] case and to go right ahead with it?

A. He called me at my home and made that offer, that is correct, yes.

Mr. Tonkoff: That's all.

Mr. Clements: That is all.

PEGGY DAVID

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. Will you state your name for the record, please? A. Peggy David.

Q. Where do you reside?

A. Moscow, Idaho.

Q. And how long have you lived here, Mrs. David? A. 27 years.

Q. What is your present business or occupation?

A. Cashier-clerk, for the the Washington Water Power Company.

Q. How long have you been in the employ of

(Testimony of Peggy David.)

that company? A. Since November 14, 1953.

Q. Were you ever employed by the Moscow Police Department? A. Yes.

Q. Were you so employed on or about January 15, 1953? A. Yes, sir. [219]

Q. How long had you been employed prior to that time?

A. Since January, either 1949 or 1950.

Q. In what capacity were you employed?

A. Desk sergeant and police clerk.

Q. During that time did you become acquainted with Justice of the Peace John Borg?

A. Yes, sir.

Q. And during that time did the Justice of the Peace John Borg transact any business in the Police Station? A. Yes, sir.

Q. Did he, during that time, hold any hearings in the Police Station in regard to criminal matters prosecuted by the State of Idaho?

A. It seems to me that he did, but I can't say for sure.

Q. Do you recall any incident where Mr. Alsager or Mr. O'Donnell had any hearing before Judge Borg at the Police Station?

A. Yes, sir.

Q. Do you have any knowledge of the character of the charge, whether it was a misdemeanor, whether it was a state charge or whether it was a violation of city ordinance?

A. It was a violation of the Green River Ordinance which comes under the State statute. Mr.

(Testimony of Peggy David.)

O'Donnell was the Prosecuting Attorney and Mr. Alsager was the defense attorney.

Q. Were you employed and were you at the Moscow Police Station on the morning of January 15, 1953? [220] A. Yes, sir.

Q. Do you recall Mr. Alsager coming into the Police Station that morning? A. Yes, sir.

Q. Was there many people in the Police Station prior to Mr. Alsager's arrival? A. Yes, sir.

Q. Are you now or were you acquainted at that time with a boy named Richard Shoup?

A. I was not acquainted with him. I met him that morning.

Q. Was he in the Police Station that morning?

A. Yes, sir.

Q. What time did he arrive?

A. I would say about 8:30.

Q. And was there other people in his company?

A. Yes, sir.

Q. About how many were there?

A. I would say about 8 or 9.

Q. What time on that morning did Mr. Alsager arrive at the Police Station?

A. I would say it was between 10 minutes and 5 minutes to nine, that is the way I remember it.

Q. You had no occasion to clock or record the time? A. No.

Q. Did he make any request of you to assist him in trying to [221] locate Justice Borg?

A. Yes, he came to the desk and asked if I would attempt to call Judge Borg.

(Testimony of Peggy David.)

Q. And did you? A. Yes, I did.

Q. Where was the first place you tried to call him? A. I called his residence.

Q. And what were you informed?

A. That he was not there.

Q. And did you call any other place?

A. Yes, I called the District Court and I received no answer,

Q. Did you make any other attempt after that?

A. Yes, sir. I called Judge Martinson's office because I could not get anyone at the District Court and Judge Martinson advised me that both Mr. Tunnicliff and Judge McQuade were out of town, therefore, I asked him if he——

Mr. Tonkoff: Now, we will object to this as hearsay.

The Court: She may answer.

A. Judge Martinson advised me that they were both out of town and I asked him if any arrangement had been made with him—I informed him first that I was trying to contact Judge Borg, and I asked him if they had made any arrangement with him to use his courtroom, which I didn't know at that time was the same as the District Court, and he said that no arrangement [222] had been made with him, and so then I called the sheriff's office.

Q. And who did you talk with at the sheriff's office? A. With deputy Hill.

Q. What did you say to him?

A. I informed him of the same thing, that I was trying to contact Judge Borg in regard to the Estes

(Testimony of Peggy David.)

case, and that Mr. Alsager and the witnesses were present at the Police Station, and if he could get hold of him, would he please ask him to come to the Police Station.

Q. Did he later call you back?

A. Yes, he called me back to tell me that Judge Borg would be down right away.

Q. Did you see Judge Borg arrive at the Police Station that morning?

A. Yes, sir, I did.

Q. To the best of your knowledge, what time would you say it was, at the time of his arrival?

A. Between 15 and 20 minutes after nine.

Q. Did you hear any conversation between he and Mr. Alsager? A. No, I didn't.

Mr. Clements: That is all. [223]

Cross-Examination

By Mr. Tonkoff:

Q. I assume that you talked this over with opposing counsel before you took the stand?

A. Yes, I did.

Q. How did you happen to remember that it was 15 minutes after 9:00?

A. We have a practice at the Police Station of logging all of the times of all telephone calls and so forth and I got quite in the habit of doing it.

Q. Do you have that log of the calls that you made? A. No, sir, I don't.

Q. Who does have it?

(Testimony of Peggy David.)

A. We do not log outgoing calls; we log the incoming calls.

Q. And do you log the time, too?

A. We log them as to who calls, the time and the nature of the call.

Q. Did you log the time when Judge Borg arrived?

A. No, sir; I said that I believed that he arrived there between 15 and 20 minutes after 9:00.

Q. And that is your best recollection?

A. Yes, sir.

Mr. Tonkoff: That is all, thank you.

Mr. Clements: That is all. [224]

E. D. HILL

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. You have stated your name; it is E. D. Hill?

A. Yes, sir.

Q. Do you hold any official position, if so, what official position do you occupy relative to Latah County?

A. The Marine Corps.

Q. I think that you misunderstood my question—do you hold any official position in Latah County, Idaho?

A. Yes, sir.

Q. What is that position?

(Testimony of E. D. Hill.)

A. Deputy sheriff.

Q. Were you a deputy sheriff or were you employed by the sheriff's office on the morning of January 15, 1953?

A. Yes, sir.

Q. Are you acquainted with Peggy David?

A. Yes, sir.

Q. What occupation was she engaged in on that day?

A. You say what occupation was she occupying?

Q. Yes.

A. She was in the employ of the Police Department of Moscow, Idaho. [225]

Q. Did you receive a telephone call from her on the morning of January 15, 1953?

A. Yes, sir.

Q. What was the nature of that call?

A. She called in regard to if I had seen Judge Borg.

Q. Did she leave any other message?

A. Yes; I told her that I had and she asked if I would see if I could contact him and tell him that Mr. Alsager and his witnesses were at the Police Station waiting for him.

Q. Did you make an endeavor to contact Judge Borg then?

A. Yes, sir; I did.

Q. And did you make contact with him?

A. Yes, sir.

Q. When and where?

A. At the Courthouse, at the bottom of the stairs at the landing—the District Courthouse.

Q. And what did you advise him?

A. That the Police Station had called and asked

(Testimony of E. D. Hill.)

me to give him the message that Mr. Alsager was waiting for him there.

Q. Who was with Mr. Borg at the time you met him?

A. As I recall, there was Mr. Estes, Mr. Felton, the newspaper reporter, and two or three others that I didn't know.

Mr. Clements: That is all.

Mr. Tonkoff: No questions.

The Court: Mr. Hill, I might tell you [226] that you got off easy.

FRED CASSIN

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. You stated your name to the Clerk, did you, Mr. Cassin? A. Yes.

Q. Where do you reside?

A. Niagara Falls, New York.

Q. Where did you reside in January of 1953?

A. Moscow, Idaho.

Q. What were you doing at that time?

A. At that time I was a reporter for the Daily Idahonian.

Q. How long before January 15, 1953, had you been a reporter for the Daily Idahonian?

A. Two years.

Q. And did you have any assignment of any

(Testimony of Fred Cassin.)

particular type of news that you covered for the *Idahonian*?

A. Yes, I covered most of the court business, some of the police business and all of the county government.

Q. Did you cover all of the original Murray Estes occurrences in January of 1953?

A. Yes, sir; I did. [227]

Q. I call your attention to exhibit marked No. 10 and admitted in evidence in the proceeding and I will ask you if you recall writing that story?

A. I don't believe I did.

Q. You didn't; were you familiar with the story at the time it was published in the paper?

A. Yes, sir; I was.

Q. Were you acquainted with Judge Borg?

A. Yes.

Q. And did you cover matters connected with his court?

A. I had reported some matters connected with his court.

Q. Did you cover the matter of the preliminary hearing at the Courthouse in the matter of the State of Idaho vs. Murray Estes on January 15, 1953?

A. Yes, sir; I did.

Q. Who instructed you there at the newspaper to cover that hearing?

A. Well, Mr. Boas did, but it wasn't necessary because it would ordinarily be on my beat in my regular job.

(Testimony of Fred Cassin.)

Q. Did you have any contact with Judge Borg prior to the time of the hearing?

A. Yes; I called Judge Borg—you mean that day?

Q. Yes.

A. I called Judge Borg that morning about a quarter past eight and I asked where the hearing would be if it would be held [228] and what time.

Q. Where did you contact Judge Borg at that time? A. At his home.

Q. How did you happen to call him?

A. I came to work and I was planning to go to the hearing and Mr. Boas, my editor, asked me where the hearing would be and I said that I believed at the Police Station and Mr. Boas said you better make sure and I called Judge Borg to make sure.

Q. Did you go to the Courthouse?

A. Yes, sir.

Q. About what time did you arrive there, at the Courthouse?

A. I should say about a quarter to nine.

Q. Where did you go after you arrived at the Courthouse?

A. I believe I went to the clerk's office to look up any court files for any other stories that I might have to cover that day. I visited the County Clerk's office every day.

Q. And did you later go to the District Court-room? A. Yes, sir; I did.

Q. Will you tell us what time you arrived there?

(Testimony of Fred Cassin.)

A. It would be not more than five or 10 minutes to nine, something like that.

Q. Was anybody in the courtroom?

A. Not when I first arrived.

Q. Did some other people arrive there [229] later?

A. About five minutes to nine, Judge Borg, Mr. Felton, Mr. Estes, and I believe Marjorie Moore, Mr. Estes' secretary, arrived through the back door. In the meantime, I had gone downstairs and was waiting near the Assessor's Office.

Q. Did any other people arrive?

A. I have no recollection of anyone else arriving, no.

Q. Were you seated in the Courtroom when Judge Borg arrived?

A. Yes, I was; I was in the first row.

Q. Will you describe the arrangement there in the courtroom so that you can get yourself located with reference to the bench where Judge Borg was?

A. Well, if we use this courtroom as a reference, I would be sitting just outside of the railing and this would be the judge here (indicating).

Q. How far from the judge's bench would you be sitting? A. I would say about 25 feet.

Q. Are there some tables in the courtroom between the seats and the bench?

A. Yes, there are two counsel tables.

Q. What happened after Judge Borg and Mr. Estes and Mr. Felton arrived?

A. Well, they all went up to the courtroom—

(Testimony of Fred Cassin.)

Judge Borg took the District Judge's seat behind the bench and I believe that Mr. Estes and Mr. Felton seated themselves at one of the counsel tables—I think that Mr. Estes did and I [230] believe that Mr. Felton walked around for a while. Mr. Felton looked at his watch and looked at the courtroom clock and I think he asked me and I believe he also asked Mr. Estes what the time was and this was, I believe, one minute to nine. I told Mr. Felton that I didn't own a watch and I didn't know the time. He seemed to be checking his watch with the clock and with other people in the room.

Q. And what kind of a watch was it, a wrist watch or a pocket watch?

A. It was a wrist watch.

Q. Go ahead.

A. And then I believe that Mr. Estes and Mr. Felton carried on a conversation for a while. I don't recall what it was, but I have an impression now that it was in subdued tones. They were perhaps discussing the case because I was just sitting there waiting for things to get started. As I recall, about seven minutes after nine, Mr. Felton, whom I believed to be representing Mr. Estes at the hearing, looked at the courtroom clock and said, "It is seven minutes past nine o'clock and the complaining witness has not appeared." He made a motion at that time, I believe, that the action be dismissed against Mr. Estes because no evidence had been brought forth with which to hold Mr. Estes to the District Court.

(Testimony of Fred Cassin.)

Q. When he was talking at this time, was he addressing Judge Borg? [231]

A. When he made the first statement about the time I think he was just talking aloud to anyone that would listen, but when he made his motion for dismissal he addressed the Court and he expressly made mention of the time, that it was seven minutes after nine.

Q. And did Judge Borg make any remarks or statement at that time?

A. As I recall, as soon as Mr. Felton had finished, Judge Borg said that he agreed with Mr. Felton that no evidence had been brought forth and that he could find no reason to bind Mr. Estes over to the District Court and that the case would be dismissed.

Q. Now, during the time that you have testified to, after the time you had arrived and after Judge Borg had arrived at the courtroom and up to the time that he made the statement that you just testified to, did he make any effort to reach any telephone? A. Not that I recall.

Q. Was there a telephone, in your knowledge, in the Probate Judge's office?

A. Yes, sir; there is.

Q. Was there at that time? A. Yes, sir.

Q. About how far from where Judge Borg was sitting was it to the telephone in the Probate Judge's office? [232]

A. From where Judge Borg was sitting, I would say it would be about 10 paces.

(Testimony of Fred Cassin.)

Q. And is there a telephone also in the law library or in the reporter's office?

A. Yes, there is.

Q. About how far was it from where Judge Borg was sitting to the telephone in the court reporter's office?

A. Well, probably not more than 20 or 25 feet, I would say.

Q. Was there a telephone at that time in the County Superintendent's office?

A. Yes, I am sure there was.

Q. How far was it to that telephone?

A. Perhaps 35 feet or so.

Q. Do you recall anybody leaving the courtroom at any time after Judge Borg arrived until the case was dismissed?

A. No, I don't recall anybody leaving the courtroom.

Q. Now, after the motion for dismissal was made and granted, what happened?

A. After the case was dismissed everybody left the courtroom. I believe that we all left the same time, that is my recollection that we were all going down the stairs about the same time.

Q. Where did you go after you left the courtroom?

A. I went immediately back to the newspaper office. [233]

Q. Did you drive? A. No, I walked.

Q. By what exit of the Courthouse did you leave?

(Testimony of Fred Cassin.)

A. By the front entrance, I would say.

Q. And do you know by what method Mr. Estes, Judge Borg and Mr. Felton left?

A. No, I don't.

Q. Did they leave with you?

A. No, they did not.

Q. From the Courthouse where did you say that you went?

A. Immediately back to the newspaper office.

Q. And what did you do after you arrived at the newspaper office?

A. I started to write my story on the incidents at the Courthouse, I mean the dismissal of the action.

Q. Did you later go to the Police Station, the Moscow Police Station? A. Yes, I did.

Q. And about how long after you arrived at the newspaper office did you go to the Police Station?

A. I should say about half an hour, perhaps a little more; it could be 35 minutes.

Q. How did you happen to go to the Police Station? A. Mr. Boas sent me there.

Q. Did he give you any instructions as to what you were to do?

A. Well, as I recall, we had gotten wind of the fact that Mr. [234] Alsager and his witnesses were at the Police Station and that there had been some mixup in regard to the preliminary hearing and, as I recall, Mr. Boas sent me over to investigate.

Q. Did you go to the Police Station?

A. Yes, sir; I did.

(Testimony of Fred Cassin.)

Q. And who did you see there?

A. Mr. Alsager and a number of people that I didn't know but who I believe were witnesses to the alleged incident.

Q. Was Peggy David there?

A. Yes, she was.

Q. Was Judge Borg there?

A. No, he wasn't.

Q. Could you tell me about what time it was that you went to the Police Station?

A. It was about a quarter to ten or ten minutes to ten, it was something like that.

Q. Could you tell me about what time it was that you got back to the newspaper office?

A. You mean from the Courthouse?

Q. Yes, from the Courthouse?

A. I would say it was about 9:15.

Q. And how far is the newspaper office from the Police Station, or how far was it at that time?

A. I think it is just about a block and a half to the Police [235] Station.

Q. And that would be a block and a half farther than the Police Station is from the Courthouse?

A. Yes, I think so.

Q. It is between the Courthouse and the newspaper? A. Yes.

Q. Have you timed yourself as to how long it takes you to walk from the Courthouse to the newspaper office?

A. I would say about five minutes.

Mr. Greene: That is all.

(Testimony of Fred Cassin.)

Cross-Examination

By Mr. Tonkoff:

Q. Mr. Cassin, how long had you been reporting for the Daily Idahonian?

A. It was about 22 months prior to this.

Q. Prior to January, 1953?

A. That is right.

Q. I assume that you had attended those preliminary hearings in the past?

A. I had attended one or two in the past, yes.

Q. And, of course, they were held in the courtroom, the District Court?

A. I never attended one in the courtroom.

Q. Where did you attend them? [236]

A. The only one that I can specifically recall now was held at the Police Station, but it was held by a police judge and Justice of the Peace Kent Power.

Q. And that is the only one that you had attended?

A. That is the only one that I can recall attending, yes.

Q. You had not attended any other?

A. No; it is my recollection, but I may be wrong on this, but, as I say, it is my recollection that many of the preliminary hearings were held at odd hours, immediately upon the arrest of the parties and we would not find out about them until the next morning.

(Testimony of Fred Cassin.)

Q. When did you move to Niagara Falls, New York?

A. Well, I moved to Lockport, New York, in April of 1953, April the 25th.

Q. Are you still following your profession there?

A. I am still in the publishing business, yes; I am not a newspaper reporter.

Q. Where are you employed?

A. I am employed by myself.

Q. When were you called and notified to come back here?

A. I was called by Mr. Boas a week ago today.

Q. You say that at the time of this hearing, rather on the 15th of January, prior to this hearing, you called Judge Borg at his office? [237]

A. I believe I called at his home.

Q. At his home, pardon me. A. Yes.

Q. And for the sole purpose of finding out where this hearing was going to be?

A. Well, it wasn't only that. There had been some doubt about the hearing all along because Judge Martinson had disqualified himself. We were under the impression that the case had been transferred to Judge Borg but I believe at that time, I am not certain, but I believe at the time that there was still some doubt in my mind that Judge Borg would handle the case.

Q. There was some doubt in your mind as to whether there was going to be a hearing at all, honestly in your mind, wasn't that right?

A. Well, I don't recall any doubt of that sort. I

(Testimony of Fred Cassin.)

had no reason to believe that there would not be a hearing.

Q. Hadn't you heard that a dismissal was filed with Judge Martinson? A. No, I hadn't.

Q. You hadn't found that out?

A. No; today was the first time that I heard about that.

Q. You said that you went up every day and looked at the judge's records, didn't you?

A. Well, I believe that it wasn't on the record, at least, I didn't see it on the record of the case against Mr. Estes. [238]

Q. You didn't see it there on the 13th or the 14th of January, the dismissal, which is Exhibit No. 11? A. No, I didn't.

Q. But there was some doubt in regard to where the hearing was to be held?

A. Yes; I remember that there was some doubt that the hearing would be held at this time, for this reason: Judge Martinson, the Probate Judge, had originally set this time for the preliminary hearing and I thought when the case went to Judge Borg that Judge Borg might set another time at his convenience for the hearing.

Q. You knew that the case was set for 9:00 o'clock in the morning on the 15th because your paper had published that?

A. Yes, I knew that.

Q. You hadn't seen any continuance or any order changing the setting, had you?

A. No, I hadn't.

(Testimony of Fred Cassin.)

Q. Any change differing from Judge Martinson's record? A. No, I didn't.

Q. You knew, as a newspaper reporter, that Judge Borg had not been active as police judge for several months prior to January 15, isn't that right?

A. Yes, I knew that.

Q. And you knew that he had no office down at the Police Station, didn't you, Mr. Cassin? [239]

A. Yes.

Q. And that is the reason that you took the trouble to call him at home to find out where this hearing would be, wasn't it?

A. Not especially. I took the trouble to call him because Mr. Boas told me.

Q. On an order from Mr. Boas—Mr. Boas had some doubt in his mind because he told you to call him as to where this hearing was to be?

A. I don't know, I couldn't say as to that because I don't know what Mr. Boas had in his mind.

Q. You did advise Mr. Boas after you made the phone call that the hearing would be up there, didn't you?

A. Yes, I told him it would be at the Courthouse.

Q. And that was prior to the time that the hearing was held that you advised Mr. Boas it would be at the Courthouse?

A. Yes, I think it couldn't have been much later than a quarter past eight.

Q. Did you speak to Mr. Estes on that date, Mr. Cassin? A. Yes, I believe I did.

(Testimony of Fred Cassin.)

Q. Concerning the filing of this complaint?

A. Yes.

Q. You told him that it appeared that Felton had filed the complaint to annoy him only, didn't you?

A. Where was this supposed to have occurred?

Q. Well, in a conversation coming down the stairs at the Courthouse? [240]

A. I had a conversation coming down the stairs at the Courthouse with Mr. Estes and I asked Mr. Estes if he would care to make——

Q. I asked you, did you make that statement?

The Court: Just let him answer the question you asked.

A. I did not make that statement.

Q. What was that?

A. I did not make that statement.

Mr. Tonkoff: That's all.

Redirect Examination

By Mr. Clements:

Q. Do you wish to explain your answer?

A. I asked Mr. Estes at that time if he would care to make a statement to the Idahonian regarding the case. I thought it was only fair to him to let him have his say in the matter because he had been put to a great deal of embarrassment by the charge. I assumed at that time, since I knew nothing about the Police Station incident, I assumed at that time Mr. Alsager had failed to appear and

(Testimony of Fred Cassin.)

wasn't going to prosecute any charges and that Mr. Estes would be completely cleared of any further prosecution, and so I asked him to make a statement for this reason. He said [241] that he would see me later. As he was going down the stairs, he swore and said these people never intended to go through with it, they were just doing this to annoy me and cause me trouble.

Mr. Clements: That is all.

Mr. Greene: I have one further question, your Honor.

The Court: Very well.

Redirect Examination

By Mr. Greene:

Q. You made mention of Mr. Felton's being present. Will you give his name?

A. That was Mr. Tom Felton, Mr. Estes' partner.

Q. That was not Mr. Henry Felton?

A. No, sir.

Mr. Greene: That is all.

Recross-Examination

By Mr. Tonkoff:

Q. Mr. Cassin, you say that you assumed that Mr. Alsager wasn't going to prosecute. You had that from something that you had heard, I assume?

A. I assumed that Mr. Alsager was not going to prosecute because of the fact that he did not appear at the Courthouse. Of [242] course, I had no idea

(Testimony of Fred Cassin.)

that there would be any dispute over this incident. I thought that Mr. Alsager hadn't appeared because he was going to drop the case.

Q. At other times when the prosecutor and the prosecuting witness didn't appear that was the regular course to follow, to order a dismissal——

The Court: That is a question of law and this witness can't answer that.

Mr. Tonkoff: That's all.

Mr. Greene: Your Honor, we have a series of exhibits here and if your Honor was going to take a recess we might have them marked during the recess and then offer them at the time Court convenes after the recess.

The Court: You might have them marked and show them to counsel and that will save some time. We will take a recess for 15 minutes.

April 7, 1954, 3:05 P.M.

Mr. Greene: I would offer in evidence at this time the Probate Court records of Latah County, being a criminal complaint in the case of the State of Idaho vs. Murray Estes charging assault with a deadly weapon against one Richard Shoup.

The Court: Is there any objection? [243]

Mr. Tonkoff: We have agreed, your Honor, that identification be waived but as to the competency, we object to that, we object as to competency only.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 14 I

will offer the original docket of Judge John K. Borg in the case of the State of Idaho vs. Murray Estes.

Mr. Tonkoff: The same objection.

The Court: It may be admitted.

Mr. Greene: As Exhibit No. 15 I will offer the original court file in the justice precinct before Justice Kent Power in the case of the State of Idaho vs. Murray Estes.

Mr. Tonkoff: Of course, your Honor, that has nothing to do with this matter nor is it commented on in the article and we object to it on that basis.

Mr. Greene: All of these incidents were commented upon in the article.

The Court: I certainly hate to read this article through again.

Mr. Greene: I might say, your Honor, this court file is the file of the case where Murray Estes is charged with assault upon one E. G. Greene and it is referred to in the article.

The Court: It may be admitted. [244]

Mr. Greene: As Defendant's Exhibit No. 16 I offer the original court docket of Judge Kent Power in the same case.

The Court: It may be admitted.

Mr. Greene: As Exhibit No. 17, Defendant's Exhibit No. 17, I offer the original docket of Judge John K. Borg's court, in the same case.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 18 I offer the original docket of Judge Kent Power,

Justice of the Peace, in the case of the State of Idaho vs. Murray Estes, charging a battery.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 19 I offer the original court file in the justice court before Kent Power and the Probate Court of Latah County on the charge of battery, against Murray Estes.

Mr. Tonkoff: I did not object to the others, but I must object to this as entirely incompetent.

The Court: Is that in the article?

Mr. Greene: Yes, your Honor.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 20, I offer the original docket of the Probate Court of Latah County in the case of the State of Idaho vs. Murray Estes, [245] this being the battery charge.

Mr. Tonkoff: And that is objected to, your Honor.

The Court: Is that referred to in this article?

Mr. Greene: That is the battery charge, yes, your Honor.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 21, I offer the original court docket of Justice Kent Power in the case of Idaho vs. Richard Shoup, charged with attempt to compound a crime, a felony.

Mr. Tonkoff: We make the same objection.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 22, I offer the original docket of the Probate Court in the case of the State of Idaho vs. Murray Estes,

assault with a deadly weapon upon Richard Shoup.

The Court: It may be admitted.

Mr. Greene: If the Court please, these exhibits are lengthy and I would waive the reading of them to the jury.

The Court: Yes, either side may refer to them in their argument or at any time during the [246] trial, and I will send them in the jury room when the jury retires.

Mr. Clements: May we stipulate for the record that they may be considered as having been read at this time?

Mr. Tonkoff: Yes, we will stipulate to that.

The Court: It may be so understood.

Mr. Greene: We will call Mr. Tunnicliff.

R. J. TUNNICLIFF

called as a witness by the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. Mr. Tunnicliff, you have been heretofore sworn in this matter? A. Yes, sir.

Q. Now, on January 21, 1953, did you attend a preliminary hearing at which Murray Estes was the defendant and charged with the crime of assault with a deadly weapon upon one E. G. Greene?

A. I did.

Q. You are the official court reporter for Latah County, I take it?

A. For the second judicial district, yes. [247]

(Testimony of R. J. Tunnicliff.)

Q. How long have you been engaged in reporting?
A. Off and on since 1920.

Q. And I take it you have taken in shorthand a good many judicial proceedings?

A. I have, yes.

Q. Did you, pursuant to a subpoena, bring your original notes of the proceedings had at the preliminary hearing referred to?
A. I did.

Q. And did you make a transcription of those notes, Mr. Tunnicliff?
A. Yes.

Q. Will you refer to what has been marked as Defendant's Exhibit No. 23 and state what that is?

A. That is the transcript of the proceedings on the preliminary examination January 21, 1953, in the case of the State of Idaho vs. Murray Estes.

Q. And is that a true and correct transcript of the testimony taken and the proceedings had at the preliminary hearing in question?
A. It is.

Mr. Greene: I now offer in evidence Exhibit No. 23, marked for identification.

Mr. Tonkoff: I object to it, and, your Honor, I would like to be heard.

The Court: Yes, I will hear you on it. [248] I have one question to ask this witness: Was this preliminary before the plaintiff in this case?

A. Yes.

Mr. Greene: Yes, your Honor, that is the second charge against Mr. Estes.

The Court: Is there anything further you want from this witness, Mr. Greene?

Mr. Greene: No, that is all.

(Testimony of R. J. Tunnicliff.)

The Court: Do you want to cross-examine him, Mr. Tonkoff?

Mr. Tonkoff: Yes, your Honor.

Cross-Examination

By Mr. Tonkoff:

Q. Mr. Tunnicliff, who employed you to take the notes at that hearing? A. Murray Estes.

Q. Did you have any conversation with Mr. Alsager concerning the case being reported?

A. Not prior to the hearing. I did about a week or ten days afterward.

Q. What did he tell you as to whether or not it was necessary or whether he believed it was necessary to have a reporter there?

A. You mean at that later conversation? [249]

Q. Yes.

A. He came to me and said that he wished he had known that a reporter was required.

Q. Was required? A. Yes.

Q. Did he make any other statement to you concerning that?

A. I believe either at that time or later that he intimated that he would like to have a copy of it.

Q. Did you have any conversation with Mr. Alsager prior to the hearing at which conversation he asked you to come in and report?

A. I did not.

Q. You had no conversation with him concerning your being present at this hearing?

(Testimony of R. J. Tunnickliff.)

A. No, I did not, at any time.

Mr. Tonkoff: Thank you; that is all.

Mr. Greene: That is all.

The Court: Now, I will hear you before I admit this exhibit.

Mr. Tonkoff: Very well, our position——

The Court: No, I will hear you later, before I admit the exhibit, however. We will go on with the testimony at this time.

Mr. Tonkoff: Your Honor, Mr. Tunnickliff has stated he would like to be excused and we have no further [250] questions to ask.

Mr. Greene: That is perfectly agreeable with us.

AL BARRACKMAN

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. Will you state your name and place of residence? A. Al Barrackman, Moscow, Idaho.

Q. And what is your occupation?

A. I am sports editor and general reporter for the Daily Idahonian.

Q. What were you doing on May 12, 1953?

A. Well, after pursuing my normal duties, I covered a meeting at the high school cafeteria.

Q. And what were you employed as at that time?

A. General reporter and sports editor.

(Testimony of Al Barrackman.)

Q. And what were your regular hours of employment? A. From 7:30 until 4:00.

Q. Did you attend special events for special stories from time to time? A. Yes.

Q. On the evening of May 12th, did you say that you attended [251] a meeting at the high school?

A. Yes, that is right.

Q. Who instructed you to attend that meeting?

A. The editor, Mr. Boas.

Q. Do you recall what time he instructed you to go to that meeting?

A. I don't recall, but I presume it was in the morning.

Q. And was attending meetings of this kind a part of your regular duties as reporter?

A. Yes.

Q. And will you tell us what you did that evening in attending that meeting?

A. As I recall it, I arrived at the high school possibly five minutes after the meeting began and I found myself a chair in the crowded confines of the cafeteria in the rear, and I immediately began taking notes of the proceedings.

Q. Who presided at that meeting, if you recall?

A. I believe it was Dean Jeffers of the University of Idaho.

Q. And who is he?

A. I don't know his exact capacity, but, as I recall it, he is a professor at the University.

Q. Could you tell us approximately how many people were there?

(Testimony of Al Barrackman.)

A. I would say there were upward of 150.

Q. Could you tell me whether they were University students or otherwise? [252]

A. I would say they were a mixture of townspeople. I don't believe there were any University students, but there might have been.

Q. Do you recall the people that talked at the meeting? A. Vaguely, yes.

Q. Could you name some of them for us?

A. There were a number of townspeople; one that I can recall distinctly was the Reverend Mr. Prawl; that, offhand, is the only name I can recall right now.

Q. Do you recall Captain Thomas making a talk there that evening? A. Oh, yes.

Q. And did you hear his talk?

A. Yes, I did.

Q. Did you take any notes of the statement that he made? A. Yes, sir.

Q. About how long did the meeting last?

A. I believe it was over at about 11:00 o'clock or shortly thereafter.

Q. Could you tell me about when the meeting started?

A. It was either 7:30 or 8:00, I am not sure on that.

Q. And about when did Captain Thomas start talking?

A. It was midway through the meeting, I would say. It was after the preliminaries had been dispensed with; it was an organizational meeting. [253]

(Testimony of Al Barrackman.)

Q. What do you mean by an organizational meeting?

A. Well, it was a group of citizens that apparently had been called together to form an organization and they dispensed with the business of naming officers and picking a temporary chairman, as I recall it, and other business of that type.

Q. And then the Captain spoke next?

A. I don't recall the order in which he did speak.

Q. Do you recall how long he talked?

A. Possibly a half an hour; I am not aware of just the time.

Q. Will you refer to Exhibit No. 1, which is a copy of the Daily Idahonian of May 13th, and referring to the article with the heading, "Good Government Association Formed at Public Meeting Called at School," who wrote that story?

A. I did, sir.

Q. And from what source did you get the information that is contained in it?

A. From my own information that I had gathered the previous evening.

Q. Was there anything furnished to you in the way of a written instrument of what went on at the meeting that you prepared the story from?

A. No, sir.

Q. I want to call your attention to a part of the article that reads as follows: "This was a ridiculous situation, said Captain Thomas. A motion for dismissal was made and it was [254] dismissed. If this

(Testimony of Al Barrackman.)

had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over." Did you hear Captain Thomas state those words that night? A. Yes, I did.

Q. And are they a correct copy of this statement as he made it? A. As I remember it, yes.

Q. Referring again to the article: "But these things, Thomas said, continued to disturb me. The extraordinary circumstances in which the first felony was dismissed. Circumstances of the dismissal of the second charge against Estes. There is no way to get justice or to correct the faults in the administration of justice without a grand jury." Did you hear Captain Thomas state those words at that meeting? A. Yes, I did.

Q. And did you make the excerpts in the story from your notes as you took them at the meeting?

A. Yes.

Q. In the newspaper article, Exhibit No. 1, what did you attempt to show by it?

Mr. Tonkoff: That is calling for a conclusion and, your Honor, the authorities are that they cannot say one thing and later say I mean something else.

Mr. Greene: I didn't mean it in that way and I will withdraw the question. [255]

Q. Is there anything in the article, Mr. Barrackman, Exhibit No. 1, other than the proceedings that went on at the meeting at the high school that evening?

(Testimony of Al Barrackman.)

Mr. Tonkoff: That is calling for a conclusion, your Honor, and we object to it.

The Court: No; he was at the meeting and he has the article.

Mr. Tonkoff: That is my objection anyway.

The Court: The objection will be overruled, and I don't believe there is, no.

Q. When did you write the story?

A. In midmorning the following day.

Q. When is the Daily Idahonian published?
What time of the day?

A. In the afternoon.

Q. In the afternoon? A. Yes, sir.

Q. Do you know whether there was a reporter at the meeting that night from the Lewiston Tribune?
A. Yes, sir.

Q. Did you know him at that time?

A. Yes, sir.

Q. If you refer to Exhibit No. 6, being the article in the Lewiston Tribune on the morning of May 13, 1953, I will ask you to state if you had read the article in Exhibit No. 6, the Tribune, before you wrote your own story appearing in [256] Exhibit No. 1?
A. I had.

Q. About when did you read the article in the Tribune?

A. It was some time soon after 7:30 o'clock the following morning.

Q. And how soon did you start to write your story?

(Testimony of Al Barrackman.)

A. I would say I started writing mine approximately at 9:30.

Q. Did anyone write anything in Exhibit No. 1 other than yourself? A. No.

Q. What did you do with the story after you finished?

A. I presented it to Mr. Boas, the editor.

Q. Do you know whether he made any changes in it, of any kind?

A. Well, it is very possible that as an editor he did, yes.

Q. At the time of the meeting were you acquainted with Captain Thomas?

A. No, I wasn't.

Q. Were you acquainted with Judge Borg?

A. Yes, sir.

Q. How long had you known him?

A. I believe that I had known Mr. Borg ever since he came to Moscow.

Q. What was the nature of your acquaintance with him? A. Just a passing acquaintance.

Q. Did you ever transact any business in his court? [257] A. None whatever.

Q. Did you see Judge Borg at the meeting that night?

A. No; I don't believe that he was there.

Mr. Greene: That is all.

(Testimony of Al Barrackman.)

Cross-Examination

By Mr. Tonkoff:

Q. You are still employed with the Idahonian, I presume? A. I am.

Q. For how long did Captain Thomas talk at the meeting?

A. Well, I find that it is hard to remember, but I believe that it was less than a half hour.

Q. He was standing up on a table or a pedestal?

A. No; he was just standing on the floor with a rostrum of sorts in front of him while he was talking.

Q. And as he talked, he turned over pages of a manuscript?

A. No; I don't believe that he had a manuscript.

Q. Well, a paper of some kind?

A. He used notes, as I recall.

Q. Did he ever furnish you with those notes?

A. No, sir.

Q. Did you ever ask him for them?

A. No, I did not.

Q. Did you talk with him that night?

A. No, I don't believe I did. [258]

Q. Did you talk with him afterward?

A. I don't believe that I ever talked to Captain Thomas.

Q. Did you send any information to the Tribune? A. I beg your pardon.

Q. Did you ever send any information about this to the Tribune? A. No.

(Testimony of Al Barrackman.)

Q. Did you notice the Tribune reporter there?

A. Yes, sir.

Mr. Tonkoff: That is all.

LADD HAMILTON

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. Mr. Ladd? A. Hamilton.

Q. I beg your pardon; Ladd Hamilton, that is correct? A. That is correct.

Q. And where do you live, sir?

A. Clarkston, Washington.

Q. By whom are you employed at this time?

A. The Tribune Publishing Company.

Q. And what is your profession?

A. A newspaper reporter. [259]

Q. How long have you been engaged in newspaper work or in that business?

A. All together approximately eight years.

Q. And what was your academic training?

A. I attended the University of Idaho; however, I did not graduate from the University.

Q. What experience have you had as a newspaper reporter, an editorial writer or a feature writer?

A. My experience has been mostly as a newspaper writer, also I have had some experience as a

(Testimony of Ladd Hamilton.)

feature writer and an editorial writer, did some editing.

Q. Have you ever been employed by either of the wire services, the AP or the UP?

A. No, I have not.

Q. What other newspapers have you worked on beside the Lewiston Tribune?

A. I have worked for the LaGrande Evening Observer, an afternoon daily, and I have done part-time work for the Coeur d'Alene Press, an afternoon daily, and I worked one summer for the Spokesman Review, a morning daily at Spokane, Washington.

Q. During your newspaper employment and experience, have you had occasion, or had you before May 12, to report public meetings?

A. Yes, sir.

Q. On May 12, 1953, what was your particular position with the [260] Lewiston Morning Tribune?

A. Reporter.

Q. Who was the managing editor on that date?

A. William F. Johnston.

Q. Did you have occasion to be in Moscow, Idaho, on May 12, 1953?

A. Yes, sir.

Q. For what purpose?

A. Covering a public meeting.

Q. Why were you there? Who sent you on that mission?

A. I received the assignment some time during the day of the 12th.

(Testimony of Ladd Hamilton.)

Q. Was that a routine assignment, or were there any special instructions connected with it?

A. There were no special instructions; it was a routine assignment.

Q. And did you attend that meeting?

A. I did.

Q. And where was it held?

A. It was held in the high school building.

Q. In what part of the building?

A. I didn't know what the room would have been used for at other times; it was either in the basement or on the ground floor.

Q. Was it a large room? [261]

A. A fairly large room, yes.

Q. How was the meeting conducted? Were you there when the meeting opened?

A. I might have gotten there a moment after the meeting officially opened. I know that I had trouble in finding a seat.

Q. To your best recollection, how many people attended that meeting?

A. To the best of my recollection there were probably between 150 and 200 people.

Q. Were you acquainted with any of the people in the audience or on the platform?

A. I was acquainted with a few of them.

Q. Could you give us generally a description of the people, the class or type of people, would you say that it was a citizenry appearing type of people or was it a student group?

A. Would you repeat the question, please?

(Testimony of Ladd Hamilton.)

Q. It was quite awkward and I don't know whether I can or not. Were those people a mature group in appearance? Did they have the appearance of citizens of the town or would you say it represented a University group?

A. By appearance they were citizens of Moscow and the immediate area.

Q. Was there a chairman conducting the meeting? A. Yes, there was.

Q. Do you know who it was?

A. Yes; it was Dean Jeffers of the [262] University.

Q. Were you personally acquainted with him?

A. Yes, I knew him.

Q. Did you speak to him that evening at all?

A. I can't remember particularly, but it is likely that I may have.

Q. Was he the chairman of this meeting?

A. Yes.

Q. And what did you understand, after you got in there, what the purpose of the meeting was?

A. Yes, I did.

Q. And what did you understand the purpose to be?

A. I understood the purpose was to form what they called a good government league.

Q. Did they name committees for that purpose that night?

A. I remember that there were some people named to some offices; whether they were committee offices or otherwise. I don't remember.

(Testimony of Ladd Hamilton.)

Q. Were there people other than Dean Jeffers addressed that meeting that night?

A. Yes, a number of people.

Q. Who were some of them that you can remember?

A. As I recall, there was Dr. Hossak, the University of Political Science Department; Captain Thomas, of course, and, as I recall, District Judge McQuade was a speaker, and there was another man who was a member of the faculty of the [263] University. To the best of recollection, and this is somewhat hazy, there were some women who spoke who were townspeople.

Q. To refresh your memory, do you recall whether Mr. Alsager addressed the meeting that night?

A. I don't remember.

Q. What did you do, as a newspaper reporter, from the time you went in there until you left?

A. I took notes.

Q. Handing you Defendants' Exhibit No. 6, which is a copy of the Lewiston Morning Tribune of May 13, 1953, to an article in connection with grand jury, do you have it there with you?

A. Yes.

Q. Who wrote that article?

A. I did.

Q. From what did you write it?

A. From notes which I wrote at the meeting.

Q. You heard Captain Thomas speak that night?

A. Yes.

Q. Now, refer to the article and find the language of this quotation that I give you: "The

(Testimony of Ladd Hamilton.)

meeting opened with a long and detailed review of the Estes-Shoup case by Captain Thomas C. Thomas, Commander of the University Naval ROTC unit, of which Shoup was a member.” Do you find that language? [264]

A. I have it, yes.

Q. Do you find that part?

A. The meeting opened with a long and detailed review and so on.

Q. Yes. A. Yes, I have it.

Q. You wrote that language, did you?

A. Yes, I did.

Q. Calling your attention to this excerpt: “Captain Thomas declared that, I don’t like the smell of it. I don’t think that we have here in this county now the proper administration of justice.” Did you hear Captain Thomas make that remark at that meeting? A. I did.

Q. And he made that remark at that meeting?

A. He did.

Q. I call your attention to another quotation supposed to be words of his: “Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol.” Did you hear Captain Thomas say those words?

A. I don’t see that paragraph just now.

Q. Two paragraphs below the one you read from before? A. Yes, I see it, and it was.

Q. Calling your attention to a further quote in that article: “Legal maneuvers had made it impos-

(Testimony of Ladd Hamilton.)

sible for the Prosecuting [265] Attorney to get a trial on that charge."

A. I don't see that, but, as I recollect, it was.

The Court: I am glad somebody else has trouble finding that besides myself, especially the man that wrote it.

A. I see it, yes.

Q. Did you hear Captain Thomas speak those words? A. Yes.

Q. Calling your attention now to another quotation from the exhibit: "At 9:00 a.m., he added, the Prosecuting Attorney and witnesses and the court reporter appeared at the Police Court, normally the place where the hearing would be held, but the judge and Estes had gone, in the meantime, to the District Courtroom to hear the case." Do you find that?

A. Yes.

Q. And did you hear Captain Thomas speak those words? A. Yes, I did.

Q. Now, referring to the quotation: "This was a ridiculous situation, Thomas said." Do you find that? A. Yes.

Q. Did you hear Captain Thomas utter those words? A. I did.

Q. Referring to another quotation: "Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake, it could have been easily rectified simply [266] by lifting a telephone and telling the Prosecuting Attorney to bring his witnesses and come on over." Do you find that? A. Yes.

(Testimony of Ladd Hamilton.)

Q. And did you hear Captain Thomas utter those words? A. Yes, sir; I did.

Q. Those words were his language and not your words? A. That is his language, yes, sir.

Q. Referring to another quotation from the article: "These things disturb him"—let me read that again—"but Thomas said these things disturbed him." A. I see that, yes.

Q. Did you hear Captain Thomas make that statement?

A. Do you mean, did I hear him make the phrase that follows that?

Q. That quotation that Thomas said these things disturbed him, is that your phrase, or did you hear Thomas make that statement?

A. That is not quoted, that is not a direct quote, you see, that is followed by a colon.

Q. Yes, that is true. Now, referring to this quotation: "The extraordinary circumstances of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another." Do you find that?

A. Yes, sir. [267]

Q. Is that a quotation of Captain Thomas?

A. Yes, it is.

Q. And did you hear him utter those words?

A. Yes, sir, I did.

Q. "Circumstances of the dismissal of the second charge against Estes." What is that? Whose words are those?

A. Those are Captain Thomas' words.

(Testimony of Ladd Hamilton.)

Q. And you heard him utter those words?

A. I did.

Q. Now, referring to the excerpt, what to do about it—I am reading from the article: “What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we’d go through this same rigamarole. There is no way to get justice or to correct the fault in this administration of justice in Latah County without a grand jury.” Is that a quotation of the language of Captain Thomas? A. It is.

Q. Did you hear Captain Thomas utter those words? A. Yes, I did.

Q. At that meeting? A. I did.

Q. On May 12, 1953? A. Yes.

Q. Were you acquainted with Captain Thomas that evening? [268] A. No.

Q. Did you have any conversation with Captain Thomas that evening?

A. Not to my recollection.

Q. You were in there all of the time while Captain Thomas was addressing this audience?

A. Yes, sir; I was.

Q. Did he read his speech from a written manuscript? A. No; not to my recollection.

Q. How did he speak?

A. As I recall, he spoke from notes.

Q. Did you ever see those notes?

A. No; I never did.

(Testimony of Ladd Hamilton.)

Q. Did you ever request him for a copy of the notes? A. No.

Q. You had no conversation with him in reference to how he prepared his address, or what he was speaking from? A. No.

Mr. Clements: That is all; you may examine.

Cross-Examination

By Mr. Tonkoff:

Q. Had you been up here in Moscow previously to report any incidents? [269]

A. I believe probably that I had but at this time I don't remember what they were.

Q. Did you cover this area normally or did someone else along with you?

A. It was our usual custom to have this area covered by someone from the plant or by a correspondent here.

Q. And this meeting was of sufficient importance so that your paper would send you up here to make a report on it? A. Yes.

Q. And undoubtedly you had heard about the dispute or confusion or whatever you want to call it concerning this Estes case, had you not?

A. I had heard what I had seen in the newspapers, of course.

Q. That is in the Tribune, I assume?

A. Well, I read more than one newspaper.

Q. Do you? A. Yes.

Q. The boss allowed you to do that?

(Testimony of Ladd Hamilton.)

A. Yes.

Q. Now, referring to the Tribune, you have read some articles in there so that this matter was of sufficient importance that it demanded attention?

A. Yes.

Q. On how many occasions would you say that the Tribune had been publishing articles concerning this situation prior to May 13? [270]

Mr. Clements: We object to that as immaterial and not proper cross-examination.

The Court: If they were articles that were shown to the Court, they were only news articles. However, he may answer if he can.

A. Will you state the question, please?

Q. On how many occasions would you say that the Tribune had published articles as to this incident concerning Mr. Estes or the controversy or whatever you call it?

A. Are you referring to the incident of the dismissal of that case on January the 15th or the altercation on December 14?

Q. Let's take the one of the dismissal of the 15th.

A. We did have an article or story regarding that on the following day?

Q. Did you have one on the previous day, Mr. Hamilton?

A. I don't recall any.

Q. Now, Mr. Hamilton, when you take notes at a meeting such as that, do you take them in long-hand or do you take them in shorthand?

A. I don't use Gregg or Pitman. I use a kind of

(Testimony of Ladd Hamilton.)

system of my own, which is a mixture of longhand and abbreviations and what not.

Q. Can you almost take a normal conversation down? A. Yes. [271]

Q. Of one speaking? A. Yes.

Q. How long a time did Captain Thomas talk that night? It has been testified here for about a half hour, is that right?

A. I would not be able to answer that because I simply don't remember.

Q. But you distinctly remember that you heard him say, "I don't like the smell of it," is that right?

A. Yes.

Q. And then in the next sentence, he said, "I don't think we have here now in this country the proper administration of justice"?

A. In this county.

Q. You are right. "Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol." You distinctly heard him make that statement?

A. I am not referring to the article now but that sounds like the statement that he made.

Q. If I am incorrect, I am sure counsel will let us know. I am reading it here: "Legal maneuvers had made it impossible for the Prosecuting Attorney to get a trial on that charge." I assume that you knew Mr. Alsager was Prosecuting Attorney since January 12?

A. I don't know now whether I knew that then or not.

(Testimony of Ladd Hamilton.)

Q. He said, "At 9:00 a.m. he added the Prosecuting Attorney [272] and witnesses and the court reporter appeared at the Police Court, normally the place where the hearing would be held." Did you hear him make that statement?

A. You say, where did Captain Thomas make that statement?

Q. I am reading from the article: "At 9:00 a.m., he added, the Prosecuting Attorney and witnesses and the court reporter appeared at the Police Court, normally the place where the hearing would be held." Did you hear him make that statement?

A. A statement similar to that. I am not reading as you go along. I believe it is where the hearing would be held rather than could be held, isn't that it?

Q. That is right. Did I misread that again?

A. Yes.

The Court: That is all right; catch him if you can.

Mr. Tonkoff: You are right. I assure you that I did not misquote it intentionally.

Q. I assume you are familiar and had reported preliminary hearings, had you not?

A. I haven't often had occasion to report preliminary hearings.

Q. I wonder if you have ever reported any up here, Mr. Hamilton?

A. I have never reported any in Moscow that I recall.

Q. I suppose that you have reported some in Lewiston?

(Testimony of Ladd Hamilton.)

A. I have reported the results of some. [273]

Q. You never attended any?

A. I believe possibly that I have, but I could not tell when or which ones.

Q. It says: "But the Judge and Estes had gone in the meantime to the District Courtroom to hear the case." Did you know that Mr. Estes had an attorney at the time that he appeared?

A. I don't remember now whether I knew that at that time or not.

Q. You learned it subsequent, is that right?

A. Well, yes.

Q. It says: "That Thomas said these things disturbed him. The extraordinary circumstances of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendants were in another." He said that, did he not? No doubt about it?

A. That is my recollection.

Q. Now, did you leave out anything that he said at that meeting, do you know? A. Yes, I did.

Q. Did he say something else in connection with this situation that you didn't report, or did report, and it wasn't printed?

A. Yes; he said some things that I didn't report. Some things that I did not report.

Q. Do you remember what they were?

A. No. They were minor things that I didn't consider had any particular bearing or were not very important. You very [274] seldom report a

(Testimony of Ladd Hamilton.)

public meeting or speeches that are made at a public meeting completely in toto.

Q. Generally you, in reporting a public meeting, if there is any doubt about the contents of anything said whether it might be maligning someone, you generally leave that out, don't you? In other words, Mr. Hamilton, if you think that the words are severely criticizing someone, you put it in your own language rather than to quote somebody, don't you?

A. You never consciously commit a libel.

Q. Sometimes you make that mistake though?

A. Papers have made that mistake.

Q. Now, when you wrote this article, did you submit it to your superior? A. Yes, sir.

Q. Is Mr. Alford your superior? Who is your superior?

A. He was not my direct superior on that night.

Q. Who was?

A. My direct superior on that night was the city editor.

Q. And who was that?

A. I don't recall who was on the desk.

Q. At any rate, the article appeared in the paper and you read it? A. Yes.

Q. And that was in substance the way that you had turned it in? A. Yes. [275]

Q. I believe I asked about Captain Thomas, but I forgot whether I asked you whether or not you had a conversation with him on that night?

A. I don't recall that I did.

Q. Or subsequently?

(Testimony of Ladd Hamilton.)

A. I don't recall any conversation.

Mr. Tonkoff: I think that is all; thank you.

Redirect Examination

By Mr. Clements:

Q. What time did this meeting adjourn?

A. I would not be able to put a time on it, but it seems to me that it was around 11:00.

Q. Where did you write the story from your notes?

A. I left the meeting and went to a fraternity house and wrote it there.

Q. Where?

A. To a fraternity house on the campus of the University of Idaho.

Q. And how did you turn your story into your paper? A. By telephone from the University.

Q. Why did you write the story up here and then telephone it down there?

A. Because it was approaching deadline time and I did not have [276] time to drive back down from Moscow.

Q. Will you explain to the jury what you mean by deadline time?

A. That is the time when the paper must go to press and when all of the copy must be prepared.

Q. The copy must be in to the linotype room in order that it make the press publication?

A. Yes, sir.

Mr. Clements: That is all.

Mr. Tonkoff: That's all.

LOUIS A. BOAS

recalled as a witness for the defendants, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. You are the Mr. Boas who previously testified in this case? A. Yes, sir.

Q. If you will refer to Exhibit No. 1 and to the article headed, "Good Government Association Formed at Public Meeting Called at School."

A. Yes, I have it.

Q. Did you see that story before it was published? A. Yes.

Q. Where did you obtain it?

A. Mr. Barrackman, the reporter, handed it to me. [277]

Q. And do you recall—when did you first see it?

A. I imagine it was around 11:00 o'clock in the morning.

Q. What time does the Idahonian go to press?

A. We stop setting type at 1:30 in the afternoon.

Q. After Mr. Barrackman gave you the story, what, if anything, did you do with it?

A. I scanned it.

Q. Did you make any changes in the story?

A. No material changes.

Q. What kind of changes did you make?

A. Well, say punctuation and checking for misspelling or grammatical checks of that kind which we do with all copy.

(Testimony of Louis A. Boas.)

Q. Did you make any changes in the quoted language that the story shows Captain Thomas made?

A. No; I would not do that, at least without consultation with the reporter.

Mr. Greene: I think that's all.

Cross-Examination

By Mr. Tonkoff:

Q. Mr. Boas, you knew at the time that you passed upon this article, did you not, and your paper had published that Mr. Estes had requested that the dismissal be set aside and the proceedings be continued as though no dismissal had ever taken place on January 15, 1953?

A. That was a long time before that. [278]

Q. That's right. A. Yes, sir.

Q. I refer you to Exhibit No. 24. Was that exhibit ever printed in your paper on the 17th of January, 1953? A. Yes.

Q. And you have knowledge of that, of course, Mr. Boas, of the article appearing in your paper?

A. Let me look at it a moment.

Q. Yes; pardon me. A. Yes.

Mr. Tonkoff: I offer this exhibit in evidence.

Mr. Greene: We have no objection.

The Court: It may be admitted.

Mr. Tonkoff: I would like to read it, if I may.

The Court: You may.

Mr. Tonkoff: This is Exhibit No. 24 and the article is entitled, "Estes Asks That Dismissal of

(Testimony of Louis A. Boas.)

Charges Be Set Aside. Murray Estes, Moscow attorney, who has been charged with assault with a deadly weapon last Monday afternoon, and against whom the charge was dismissed in a preliminary hearing at the Courthouse Thursday morning, said today that he would file a motion to have this dismissal set aside and a new time for [279] preliminary hearing. Estes made this known in a statement given the Daily Idahonian this morning. This dismissal was entered by Justice John Borg when the complaining witness, Richard L. Shoup, and Prosecutor Melvin Alsager failed to appear at the time fixed for the hearing.

“Later it developed Alsager, Shoup and eight other witnesses were at the Police Station in the belief the hearing would be held there. Estes, in his statement today, said: During the past week I have remained silent, despite all of the adverse publicity which I have received, believing, as I have always believed, that other people were not interested in my personal troubles. It is now apparent that I must take some action to defend myself and my family.” And in capital letters, “Not Warranted,” and the article goes on: “The facts do not warrant the charge which has been placed against me, nor the publicity which the case has received. After living in this community for 44 years, 20 of which have been spent in the practice of law, and having never been accused of a crime during that period, it would seem that the public would believe some logical explanation to exist for the actions on my

(Testimony of Louis A. Boas.)

part which give rise to this incident. Apparently, I have not received the benefit of that indulgence. It has been implied that the charge filed against me was dismissed as [280] the result of a trick. Such was not the case. It was announced in the Daily Idahonian on Tuesday that a preliminary hearing would be held at the County Courthouse on Thursday at 9:00 a.m. In the 20 years I have practiced law, a preliminary hearing has never been held, to my knowledge, in another location than the Courthouse. A reporter for the Daily Idahonian was present in the District Courtroom at the hour fixed, also apparently of the belief the hearing would be there. This was also true of a small audience. Since I feel I am not guilty of this charge, I have determined to file a motion to have the order of dismissal in this case set aside and a new time fixed for preliminary hearing, if the Prosecuting Attorney so desires."

Mr. Tonkoff: That is all.

Redirect Examination

By Mr. Greene:

Q. Do you know whether any such motion was ever filed by Mr. Estes? A. I don't know.

Q. At whose request was this quotation from Mr. Estes printed in the paper?

A. At Mr. Estes' request.

Q. And did you print the entire statement as he gave it to you?

(Testimony of Louis A. Boas.)

A. I printed the entire statement as he gave it to me, yes. [281]

Q. How long prior to the time it was published that he gave it to you?

A. I believe it was that same morning and it was published in the afternoon paper the same day that he was in the office in the morning.

Mr. Greene: That is all.

Mr. Tonkoff: That is all.

The Court: We are going to adjourn at this time until 10:00 o'clock tomorrow morning. I might say to the jury at this time that Captain Thomas is no longer in this case. The fact that he is dismissed from this case is no inference at all that anyone else should remain in the case, or should not. Captain Thomas had nothing to do with the reporting of this article or writing the article in the papers and, therefore, he has been dismissed. Court will now adjourn until 10:00 o'clock tomorrow morning. The jury will be excused, but I will take up a matter with counsel in the absence of the jury.

(Whereupon the Court heard arguments of counsel concerning the admission of Exhibit No. 23.)

(Argument reported but not transcribed.)

The Court: I think I understand fully the position of each of counsel and I will look into this matter further and rule on it tomorrow morning. [282]

April 8, 1954, 10:00 A.M.

The Court: Exhibit No. 23 will be admitted in evidence.

Mr. Greene: May we read it at this time to the jury, your Honor?

The Court: Yes, you may.

Mr. Greene: I think perhaps it would be easier if someone sat in the witness chair and read the exhibit.

The Court: That would be entirely agreeable any way that you gentlemen decide. I always like to see an attorney on the witness stand anyway.

(Whereupon, the exhibit was read to the jury by Mr. Clements. Not included in this transcript by order of counsel for plaintiff.)

Mr. Greene: The defendants that I represent rest.

Mr. Clements: And that is true of the ones that I represent.

Mr. Tonkoff: We will call Judge Martinson in rebuttal. [283]

LLOYD G. MARTINSON

called by the plaintiff in rebuttal, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Are you the same Lloyd Martinson that testified here the other day? A. Yes, I am.

Q. Judge Martinson, I will ask you whether or

(Testimony of Lloyd G. Martinson.)

not a motion for dismissal was filed with you at the District Courthouse on the 13th day of January, 1953? A. Yes.

Q. Who brought the motion to the Courthouse?

A. Mr. Huff and Melvin Alsager.

Q. And what time of the day was that?

A. I cannot set the hour, but it was in the afternoon, the late afternoon, I remember that.

Q. And Mr. Huff was present?

A. Yes, sir.

Q. Will you state what was said by Mr. Alsager, the conversation there in your courtroom?

A. I don't remember too well. I remember that Mr. Huff and Mr. Alsager came in and Mr. Alsager had this paper in his hand. One or the other told me that they were filing a motion to dismiss. I believe that Mr. Alsager told me they were filing [284] a motion of dismissal.

Q. Did you file that motion?

A. Well, I remember that I was very reluctant to file it and I told them that at least since I had consulted with Mr. Shoup in my office before I took over the probate judgeship, that I was going to disqualify myself in this case and I told them that I was very reluctant, for that reason, to file that paper.

Q. How long was that motion in your office?

A. I know that it was in my office until the next day.

Q. Did you have any other conversation with Mr. Alsager concerning this motion to dismiss?

(Testimony of Lloyd G. Martinson.)

A. Yes; I remember after Mr. Huff left Mr. Alsager stayed around a little while longer and we discussed the filing of that motion, and I can't remember the nature of the conversation.

Q. Did he insist on your filing it?

A. Yes, he wanted it filed.

Q. Did you have any other conversation later?

A. I went down to his office; I think it was the next day. I can't remember just the time, but I believe that it was in the afternoon. I think it was after a Chamber of Commerce meeting but I can't be sure, but it seems to me that it was on Wednesday, yes, I know it was. I went into Mr. Alsager's office and I told him at the time that I had decided to disqualify myself and that I entirely disagreed with the [285] filing of that motion—I didn't feel that it should be filed and I told him that he should withdraw it—I permitted him to withdraw it.

Q. Did he tell you in this conversation that he was not going to appear at the hearing?

A. No, he did not tell me one way or the other.

Mr. Tonkoff: That is all.

Cross-Examination

By Mr. Greene:

Q. Who did you understand Mr. Huff was representing? Did you understand he was representing Mr. Estes?

Mr. Tonkoff: We object to what he understood, your Honor.

(Testimony of Lloyd G. Martinson.)

The Court: There is no question who he was representing.

Mr. Tonkoff: There will be as the testimony develops.

The Court: Certainly there is plenty of evidence to show that he was representing Mr. Estes. Go ahead; ask the question.

(Question read by reporter.)

A. I don't remember, your Honor, whether he told me who he was representing.

Mr. Greene: That is all. [286]

Mr. Tonkoff: That's all.

LAURENCE HUFF

called as a witness by the plaintiff, in rebuttal, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is Laurence Huff and you are the same Mr. Huff who testified the other day?

A. Yes, sir.

Q. Mr. Huff, did you visit Mr. Alsager at his office on the 13th day of January, 1953?

A. I did.

Q. At that time were you requested by Mr. Estes or by anyone to appear on behalf of Mr. Estes?

A. I was not.

Q. What was the circumstances under which you appeared in his office?

(Testimony of Laurence Huff.)

A. I was the senior member of the bar at Moscow from a point of experience and age and Mr. Alsager, prior to that time, had consulted me frequently and asked my advice in regard to other matters in the law business. At this time I interested myself in the matter because of the effect of this charge on the public and on the members of the bar and I went voluntarily to Mr. Alsager's office. [287]

Q. And what conversation was had at his office concerning the motion for dismissal? Will you relate what was said in his office?

A. We had a considerable discussion and Mr. Alsager related to me the circumstances of this motion being filed immediately after his being sworn into office. He related to me the fact that he had not been consulted by the complaining witness or anybody prior to the time the motion was filed and was in doubt as to what to do about it. I related to him at that time the result of my knowledge of the case. There was a discussion between us as to who had probably drawn this criminal complaint and I related to him a conversation that I had had with Mr. Henry Felton of Lewiston just a few days previous in regard to the case. We studied this copy of this criminal complaint and in our discussion it was discussed as to whether or not this criminal complaint—I am talking about the criminal complaint now that was filed on the 12th day of January. As to whether or not—we discussed as to whether or not this criminal complaint actually charged any person, any individual, with the crime

(Testimony of Laurence Huff.)

of assault with a deadly weapon and while the complaint had charged that Mr. Estes had committed the assault with a deadly weapon, yet, in the complaint itself, it did not say upon whom the assault was committed. We referred to it at that time as double talk. Then there was a discussion as to what should be [288] done about it. I offered the discussion, that in starting out as Prosecuting Attorney, that he should make it clear to the people immediately that he was running his office and that someone else was not running his office for him. Behind the whole deal there appeared to be——

The Court: Let's have the facts only.

Mr. Huff: I beg the Court's pardon.

The Court: I can't see what this quarrel between the attorneys as to which one is a liar and which one is not a liar has to do with the issues in this case, but you go ahead, but let's cut it as short as possible.

Q. Who prepared the dismissal, Mr. Huff?

A. Mr. Alsager and I, in the back room of his office, discussed the dismissal and the terms of it and we penciled out a rough form of dismissal together.

Q. Where was it typed?

A. Mr. Alsager suggested to me that his stenographer was new and wasn't experienced and I offered to take it back to my office and put it in form.

Q. And did you return it?

(Testimony of Laurence Huff.)

A. I returned it that same afternoon as soon as it was put in form.

Q. Did you go to Judge Martinson's Court in the District Courthouse [289] and file that?

A. Yes, sir.

Q. Who was present?

A. I went with Mr. Alsager.

Q. At that time had you discussed with Mr. Estes concerning representing him?

A. I had not been called by Mr. Estes, that is, in the form of attorney and client.

Q. Did Mr. Alsager tell you whether or not he was going to appear?

A. Not at that conversation that afternoon.

Q. When did he tell you?

A. It was the next day.

Q. That was the 14th?

A. The 14th.

Q. What time of the day was it?

A. My best memory is that it was during the forenoon of the 14th.

Q. Was there any reason for you to appear with Mr. Estes the following morning, the 15th, at the District Court, were you representing him at that time?

A. I was not representing him at that time, no.

Q. Was there another motion for dismissal prepared?

A. I prepared a motion for dismissal—

Mr. Clements: We object to that as not [290]

(Testimony of Laurence Huff.)

proper rebuttal; there is only one motion for dismissal in evidence here.

The Court: Make it short and go ahead.

A. If I may state as being preliminary, Mr. Martinson had indicated on the afternoon before that he was going to disqualify himself and so from the previous motion of dismissal I made an exact copy changing the name of the Court and the name of the Justice.

Q. Did you deliver that to Mr. Alsager?

A. I talked to Mr. Alsager about it on the 14th.

Q. Did you deliver it to him?

A. I had the paper and discussed it with him on the 14th.

Q. Did you have any conversation with him at the time that you presented the second motion for dismissal as to whether or not he was going to appear?

A. At that time he informed me that he wasn't going to make a motion for dismissal but he didn't intend to make any appearance in the action.

Mr. Tonkoff: That is all.

Mr. Clements: No cross-examination.

Mr. Greene: I have one question.

Cross-Examination

By Mr. Greene:

Q. Mr. Huff, you heard the transcript of the preliminary [291] hearing read just a few moments ago, did you not? A. Yes.

(Testimony of Laurence Huff.)

Q. Are you the Mr. Huff referred to in that transcript? A. Yes.

Q. And were you representing Mr. Estes at that preliminary hearing?

A. Yes, at that second hearing, I was.

Mr. Greene: That's all.

Mr. Tonkoff: That is all.

WINN BLAKE

called by the plaintiff, as a witness in rebuttal, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. What is your profession, Mr. Blake?

A. Attorney at law.

Q. Where do you practice?

A. Lewiston, Idaho.

Q. Do you hold any official position?

A. Prosecuting Attorney of Nez Perce County.

Q. Were you Prosecuting Attorney of Nez Perce County in January of 1953? A. Yes, sir.

Q. That was in the same county, Nez [292] Perce? A. Yes, sir.

Q. Do you recall a telephone call from Mr. Alsager at Moscow? A. Yes, sir.

Q. What time did you receive that call?

A. Mel called me—it is difficult to fix the day, but it was the date that the article first appeared in the Tribune, I think, or the following day. He called me at home in the evening.

Q. And about what time?

(Testimony of Winn Blake.)

A. Early in the evening. I think around 6:30 or 7:00 o'clock.

Q. And will you state what conversation you had with him?

Mr. Clements: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Tonkoff: I would like to state this——

The Court: You can state, if you want to impeach Mr. Alsager, you can state to this witness Mr. Alsager's testimony and ask him if it was true. That testimony has no bearing in this case except for one thing and that is to impeach the integrity of Mr. Alsager.

Mr. Tonkoff: I thought I asked Mr. Alsager.

The Court: You asked Mr. Alsager but you didn't ask him the question that you had asked Mr. [293] Alsager nor did you give Mr. Alsager's answer. I remember Mr. Alsager's testimony. I was listening to it very carefully.

Mr. Tonkoff: Unfortunately, I cannot think of it at the moment, your Honor.

The Court: I can tell you what he said. He said that he couldn't remember just what he discussed with him on the telephone.

Mr. Tonkoff: Then I take the position that I could ask this witness the question. I had no other opportunity. A witness can always avoid impeaching questions by saying, "I don't remember."

The Court: Then this time he avoids it.

Mr. Tonkoff: All right. That is all, Mr. Blake.

The Court: You cannot impeach without getting the question exactly as to what was said.

TOM FELTON

called by the plaintiff as a witness in rebuttal, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. What is your profession, Mr. Felton? [294]

A. I am an attorney at law.

Q. Where do you practice?

A. Moscow, Idaho.

Q. Are you associated with anyone?

A. I am.

Q. With whom? A. With Murray Estes.

Q. Were you associated with him in January, 1953? A. I was.

Q. Did you, during the month of January, represent Mr. Estes in any proceeding? A. I did.

Q. Will you state which one it was?

A. I appeared as counsel on the original proceeding before Judge Borg when Mr. Estes was charged—there was a criminal complaint filed against Mr. Estes.

Q. What date was that, do you recall?

A. To the best of my recollection it would have been 1-15-53, on January 15, 1953.

Q. What time did you appear at the District Courthouse?

A. Not later than 8:50 of that morning.

(Testimony of Tom Felton.)

Q. How long did you remain there?

A. At least until—it was after 9:20 or 9:25.

Q. It was after 9:00 o'clock?

A. Yes. [295]

Q. Who was present when you arrived there?

A. I can definitely recall the young reporter. I think his name was Cassin, for the News Review, and three young chaps from the University, and there were other people present but exactly, I don't recall who they were. I wasn't paying any particular attention, outside of this chap that I knew.

Q. About a quarter after nine what did you do?

Mr. Clements: Now, if the Court please, we suggest that these are leading questions, directing his attention to a particular time.

The Court: Well, they are both lawyers. I think perhaps they should be allowed to do this. Go ahead. It seems to me that this case is developing into a trial of lawyers. I don't like to have the profession attacked so much.

A. May I have that question?

Q. Let me ask this: When did Judge Borg appear?

A. It was prior to 9:00 o'clock, as to the exact moment I didn't make any check on it, but I know it was prior to 9:00 o'clock.

Q. Was he there when you arrived?

A. I cannot recall at the moment.

Q. Did he subsequently arrive?

A. He was present when I was there and I know prior to 9:00 [296] o'clock.

(Testimony of Tom Felton.)

Q. What did you do after 9:00 o'clock?

A. Some time after 9:00 o'clock I made an original motion—wait a minute—some time after 9:00 o'clock I went into Martinson's office, that is Judge Martinson, and I telephoned to the jail.

Q. For what purpose?

A. To see if by any chance there was any witness over there.

Q. Were there any there?

A. There was no information given to me to that effect, no.

Q. What did you do then?

A. I came back into the courtroom and made a motion.

Q. And what was the substance of that motion?

A. To dismiss for the failure of proof.

Q. What time did you make that motion?

A. It was shortly after 9:00 o'clock; the exact time I don't recall the first time I made the motion.

The Court: Didn't you go into this in your case in chief? It seems that I remember the dismissal and all was gone into, the time and so forth.

Mr. Tonkoff: It has been testified to by Mr. Alsager that it was shortly after 9:00 and what I want to develop is the definite time.

The Court: Oh, you are still after Mr. Alsager. Go ahead. [297]

Mr. Tonkoff: No, your Honor, I am not after Mr. Alsager; I am not after anyone; I am just after the facts.

The Court: Go ahead.

(Testimony of Tom Felton.)

A. I made that motion to dismiss.

Q. And when did the Court grant the motion?

A. The Court refused to grant my first motion. He said we better wait a while.

Q. And when did he finally grant it?

A. To the best of my recollection it was at least a quarter after nine when I made that second motion and it was not granted immediately at that time.

Mr. Tonkoff: Your witness.

Mr. Greene: No questions.

Mr. Clements: I have no questions.

Mr. Tonkoff: I wonder if the Court was going to take a recess.

The Court: If you want a recess, yes. We will recess at this time until 2:00 o'clock this afternoon.

April 8, 1954, 2:00 P.M.

Mr. Tonkoff: That is all; the plaintiff [298] rests.

The Court: Do you have any surrebuttal?

Mr. Greene: None, your Honor.

Mr. Clements: None.

The Court: I will ask the jury to retire into the hall for a few minutes.

I excused the jury thinking perhaps you had some motions.

Mr. Greene: I did have a motion here I wanted to read into the record at this time.

The Court: Very well.

MOTION FOR DIRECTED VERDICT

Mr. Greene: At this time I would like to renew the motion that we made at the close of the plaintiff's case for a renewal of our motions to dismiss. In addition, I would like to move that the Court direct a verdict in favor of the defendants in each of the actions upon the following grounds:

First, that the alleged libelous matter—that the undisputed evidence shows that the alleged libelous matter in the issues of the two newspapers were true and correct reports of a matter of public concern, being a meeting at the school house in Moscow, Idaho, on the 12th of May, 1953. That the plaintiff has failed to prove any actual malice and the accounts being correct and true reports of what took place at that meeting are privileged.

Second, on the further ground that the undisputed [299] evidence shows that the matter alleged to be libelous is not libelous per se and in the absence of an allegation of special damages and a showing of malice it is not actionable.

Third, upon the ground that any proof of damages with respect to the plaintiff's reputation for truth and veracity is so nebulous and uncertain that it would not support a jury's verdict in favor of the Plaintiff.

Mr. Greene: I might say in support of that motion——

The Court: I don't care to hear any argument on this.

Mr. Greene: Very well, your Honor.

The Court: The Court will be in recess for ten minutes. [300]

April 8, 1954, 2:20 P.M.

RULING OF THE COURT

The Court: The two alternates are excused from further attendance in this matter.

Ladies and Gentlemen of the Jury: The Court has before it a Motion for a Directed Verdict upon the facts in this case. The evidence in this case has taken a very wide range during the past three and a half days, but it has been narrowed down to the question of whether the published articles of May 13, 1953, appearing in the Lewiston Morning Tribune and the Daily Idahonian were libelous and published with malice, or, in other words, were the articles themselves of a malicious nature, or were they intended to injure and damage the plaintiff by attacking his honesty, or even inferring that he was dishonest or unfit for the position he held.

In a determination of this question the articles as published must be taken as a whole, and then we must consider the intent of the publisher of the article. To do this we must go into the background or the reason for the meeting that was held, and which was reported and the report published the next day in the respective papers. We have evidence here of the incidents leading up to the meeting of the citizens, incidents beginning back in December of 1952, resulting [301] in complaints being filed charging Mr. Estes with a felony, to wit, Assault

with a deadly weapon; thereafter the matter was brought before a committing magistrate, certain actions were taken by the committing magistrate, apparently to the dislike of some citizens resulting in a great deal of discussion and newspaper articles in the *Spokesman-Review*, and, finally, a meeting held on May 12, 1953. Here the newspapers in question came into the picture, their reporters attended the meeting, reported the proceedings, and we must remember that the articles were a report of a meeting conducted by laymen, how else would laymen express their feelings; one utterance was, "Had this been an honest mistake," etc., this and other statements were honestly and fairly reported in these articles. Indeed, it appears to me that there must be considerable imagination injected into any consideration of this, to reach the conclusion that the articles were libelous—much less published with malice.

We must be careful in such matters lest we stifle the press and free speech; lest we find ourselves as many other people find themselves today, fearful of speaking—and having a press subservient to any certain group. [302]

The rule that you cannot criticize those in governmental positions is an old rule and does not exist in this land of ours. Judges and all public officers from the lowest public offices to the highest are subject to criticism, if the criticism is fair and honest. The people are vitally concerned in the conduct of those that are elected or appointed to public office. The interest of the public here outweighs the

interest of the plaintiff or any other individual. The protection of the public requires not merely discussions but information. Conduct and views which some disapprove and others approve are constantly imputed to our public officers. Errors of fact are inevitable and information and discussion will be discouraged and the public interest in public knowledge of important facts will be poorly defended if stating the facts fairly subjects the author or the newspaper publishing the comment to a libel suit without even showing an economic loss. Public interest outweighs the utterance or publication complained of. There can be no mistake that the author and publisher here stated the facts fairly and without malice.

It is unnecessary for me to comment on it, but I will say it was the duty of the Justice [303] Court, if he did not want to conduct the examination, to tell the Prosecuting Attorney that he wanted him to conduct it. If he did not tell him that he wanted him to conduct it, the Prosecuting Attorney did not appear. If he did not call the Prosecuting Attorney, then he should have called the witnesses and determined whether there was probable cause to hold the defendant for trial on the charge or dismiss it. Instead of trying to locate witnesses and call the county attorney to advise them that the hearing was being held, he summarily dismissed the case and by so doing he no doubt left himself open to criticism. Sometimes when criticism is made by laymen there may be some harsh statements made, but even lay-

men have a right to draw a reasonable inference from the facts.

Sometimes things happen that give the appearance of evil, and in the conduct of human affairs it is well to keep in mind that provision of the Scripture that says, "You should avoid the appearance of evil," and to my way of thinking that is particularly true of public officials, and it is well to remember that it would be a serious matter to lay down a rule of law that would make a citizen or [304] newspaper fearful of criticizing officials for permitting conditions of law enforcement to exist in a community that were unhealthy to its community life.

Our public officials should so conduct themselves as to not bring on such criticism. Everyone has a right to comment on matters of public interest and concern and criticize freely the acts of public officials with an honest purpose, however severe in terms, as long as the facts stated form a reasonable basis for the conclusion reached. I can find no evidence in the record that the articles in question were not fair comments on the conditions that existed at the time the articles were published. If I submitted this case to you, I would have to advise you that you must find malice on the part of the Publisher. Malice, as used in law of libel, means just about what it means to us in everyday speech. It means a wicked and perverse desire to inflict harm on a person for the sake of inflicting harm. Malice is ill will. There is nothing to show in this report of the public meeting and the evidence now before

us. The facts are just to the contrary. The Moscow paper published the statement of Mr. Estes word for word as he requested it, showing they were [305] willing to publish all the facts, even from Mr. Estes.

I am sorry in this case that it was necessary, or anyone felt it was necessary, to charge corruption, perjury, or attack the integrity and honesty of the members of this bar. I have been on this Bench for a long period of time, and I have felt that the Bar of Idaho was as fine a Bar as there could be anywhere. This case was presented by very able counsel. Mr. Tonkoff and myself have disagreed sometimes during the trial of this case as to the law. He may have been right and I may have been wrong, because he is one of the ablest counsel that the State of Washington has, and he comes to us from the State of Washington, and he comes to us with a reputation of honesty and integrity above reproach.

In our system of jurisprudence the Court has certain duties as well as the jury; one of those duties is to relieve the jury of the responsibility of passing upon questions where the evidence, in the Court's judgment, is insufficient to submit the matter to the jury. It would be rather foolish and ridiculous for me to submit this case to [306] you, and then say, as a matter of law, I would have to set your verdict aside unless it agreed with my opinion.

I am assuming that responsibility here, and in the foregoing statement I have endeavored to point out deficiencies in the evidence here to make out a case to submit to you as jurors. You will understand that you are assuming no responsibility here; it is

entirely the responsibility of the court. I am granting the Motion for an instructed Verdict.

Mr. Wayne Johnson, Juror number one, you will act as foreman for the jury and you will sign the verdict I have had prepared and which will be handed to you by the Bailiff.

I want to thank you for your careful attention to the evidence here.

Mr. Bailiff, show the verdict to counsel.

Ladies and Gentlemen of the Jury, again I want to say to you that it has been a real pleasure to have you here during this part of this term of court, and I appreciate getting better acquainted with you all. I want to thank you for the careful attention that you have given this matter all the way [307] through, and I hope that as you retire to your homes and places of business you will feel that the Court has acted conscientiously in accordance to what I felt was the just thing to do in this case.

Court will now be in recess. [308]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court in and for the District of Idaho, and

I further certify that I am the person who took in shorthand the evidence submitted and the proceedings had in and about the trial of the above-entitled cause, and

I further certify that I thereafter transcribed the same into longhand (typing) and that the foregoing transcript, consisting of pages numbered to 308, is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In witness whereof I have hereunto set my hand this 28th day of July, 1954.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed July 29, 1954.

[Endorsed]: Nos. 14469 and 14470. United States Court of Appeals for the Ninth Circuit. John K. Borg, Appellant, vs. Louis A. Boas and The News-Review Publishing Company, Inc., a Corporation, Appellees, and John K. Borg, Appellant, vs. The Tribune Publishing Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Central Division.

Filed August 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

